Supreme Court, U.S.
FILED

No. 06-__ 061117 FEB 8 - 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OSCAR T. BROOKINS & KATHRYN J. BROOKINS,
Petitioner,

v.

BOSTON ZONING COMMISSION, BOSTON REDEVELOPMENT AUTHORITY, PRESIDENT AND FELLOWS OF HARVARD COLLEGE, MISSION HILL NEIGHBORHOOD HOUSING SERVICES AND ONE BRIGHAM CIRCLE, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Appeals Court of Massachusetts

---

PETITION FOR A WRIT OF CERTIORARI

OSCAR T. BROOKINS, *Pro se*
KATHRYN J. BROOKINS, *Pro se*
4 Hillside Street
Boston, MA 02120
(617) 427-4140

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Is the right to a rule of law a fundamental right guaranteed under the U.S. and Massachusetts Constitution? Does the Boston Zoning Code, Article 80 violate the petitioners' right to the rule of law in zoning cases?

2. Is a "civil conspiracy" to exchange money and property to change the zoning laws in the Mission Hill Zoning District a violation of the petitioners' right to a rule of law, the equal protection of the law and the due process of law? Does the exchange of property for zoning laws constitute "contract zoning"?

3. Is "community process" as used by the BRA a substitute for the rule of law?

4. Did the Mass. Appeal Court err in Ruling that the petitioners had no standing to pursue their complaint by not acknowledging the statute that confers "rights in the nature of mandamus" to challenge zoning decisions? Did the Massachusetts Supreme Judicial Court err in denying the petitioners' further appellant review because of the errors in the decisions below?

5. Did the rezoning of the Harvard ledge site for institutional use constitute "spot zoning" because the long term tenant, Partners Health Care, the parent company of the Brigham & Women's Hospital is a medical institution and the subject site should be included in the Brigham & Women's Master Plan?

6. Did Harvard violate the trust placed in it by their Charter of 1650 to use the assets entrusted to it over the last 356 years solely for the benefit of their students by the gift-sale of their ledge site to a for-profit group for $2 million?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
The Material Facts	4
ARGUMENT	13
Standing	16
Contract Zoning	20
Spot Zoning	24
Breach of Trust	26
Due Process	27
CONCLUSION	29
APPENDIX A — Extension of time to file a petition for a writ of certiorari to February 8, 2007	1a
APPENDIX B — Judgment after rescript, October 19, 2006	2a
APPENDIX C — Notice of Denial of Further Appellate Review, October 11, 2006	4a
APPENDIX D — Memo & Order Pursuant to Rule 1.28, July 13, 2006	5a
APPENDIX E — Judgment on Findings of the Court, May 6, 2003	10a

TABLE OF CONTENTS—Continued

Page

APPENDIX F — Memo & order on Defendants' Motion for summary judgment, May 5, 2003 ..... 11a

APPENDIX G — Memo of Decision on Plaintiffs Motion for preliminary injunction, February 12, 2002 ..... 24a

APPENDIX H — Request for a Temporary Restraining Order, February 5, 2002 ..... 28a

APPENDIX I — Emergency Motion to Intervene of One Brigham Circle, LLC, September 17, 2001 ..... 30a

APPENDIX J — Defendant's Motion to Dismiss Plaintiffs' Complaint and memo in support Thereof: October 14, 1999 ..... 32a

APPENDIX K — Memo of Decision and Order on Defendants' Motions to dismiss. November 22, 1993 ..... 37a

APPENDIX L — Order on Defendant's Motion for Statutory Bond. January 14, 1991 ..... 46a

TABLE OF AUTHORITIES

CASES Page

Brady v. Board of Appeals of Westport, 348 Mass, 515, 519 (1965) 17

Hillary Goodridge & others v. Dept. of Public Health & others, 44 Mass. 309, 798 N.E. 2nd 941 (2003) 29

Laura Green v. Board of Appeals of Provincetown, 26 Mass App. Ct. 469 529 N.E. 159 (1988) 16, 19

Laura Green v. Board of Appeals of Provincetown, 404 Mass. 571, N.E. 536 2d. 584 (1989) ... 17

Nectow v. City of Cambridge, et al, 277 U.S. 183, 48 S. Ct. 447, 72 L.E. 842 (1928) 8

Anthony Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 28

Vokes v. Avery W. Lovell, Inc., 18 Mass. App. Ct. 471, 482-483 (1984) 17, 19

OPINIONS BELOW

The Supreme Judicial Court for the Commonwealth of Massachusetts Denied Further Appellant Review, September 11, 2005. Mass. Appeals Court Memorandum and Order Pursuant to Rule 1:28, on July 13, 2006. Memorandum of Decision and Order on Defendant's Motion for Summary Judgement, May 5, 2003. Denial of Request for Injunctive Relief, February 12, 2002.

A Request for a Temporary Restraining Order was denied on Feb. 5, 2002.

JURISDICTION

The judgement Petitioners seek to have the court review was entered on September 19, 2006. The petitioners time in which to file their petition for writ of certiorari was extended to February 8, 2007. This Court has jurisdiction to review this petition based on U.S.C. Title 28, Part IV, Chap. 01, Section 1250, and the U.S. Constitution Article III. Petitioners have exhausted all appeals to the Courts of Massachusetts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the U.S, Fourteenth Amendment. Section 1 ". . . No State shall make or enforce any law which shall abridge the privileges . . . nor shall any State deprive any person of life, liberty, or property without due process of the laws."

The Constitution of Massachusetts, Part the First, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, Article XXX. "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the

legislative and executive powers, or either of them; to the end it may be a government of laws and not men."

Massachusetts General Laws Chapter 249: Section 5. Action in the nature of Mandamus. "A civil action to obtain relief formerly available by writ of mandamus may be brought in the supreme judicial or superior court or if the matter involves any right, title or interest in land in the land court. . ."

Boston Zoning Code St. 1956 Chapter 10 A (as inserted by St. 1987, c 371, s. 2) "Any persons aggrieved by a decision of the of the zoning commission approving a zoning map amendment . . . may appeal such decision to the superior court in the county of Suffolk . . . Upon an appeal pursuant to this section, the court shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul such action if found to exceed the authority of such of such commission, or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive; but the parties shall have all right of appeal and exception as in other equity cases . . . costs shall not be allowed against the party appealing from the action of the commission unless the court finds that said party acted in bad faith or with malice in appealing to the court."

Boston Zoning Enabling Act. Article 80-1 Purpose of this Article. "The Purpose of this Article is to provide clear, predictable and unified requirements for the review of development projects throughout the City. These review requirements also provide important opportunities for community involvement in development review activities that affect the quality of life in the City."

Boston Zoning Code, Article 59, Mission Hill Zoning District: Article 80 Large Project Review, and Map Amendment No. 390. "The Zoning Commission of the City of Boston, . . . amends 'map 6d, Mission Hill Neighborhood District,' of the series of maps entitled "Zoning Districts City

of Boston," . . . as follows: By adding the designation "D" indicated a Planned Development Area overlay district to the existing zoning of two parcels of land, totaling approximately 9.25 acres. . ."

Magna Carta, [40] 1215 A.D. "To no one will we sell, to no one will we refuse or delay right or justice."

STATEMENT OF THE CASE

This case is about Harvard and the Boston Redevelopment Authority exchanging real property to get zoning relief for construction projects in the Longwood Medical Area and the Mission Hill Zoning District of Boston. The petitioners filed their first challenge to the resulting zoning relief in 1989. The Appeals Court appended the decisions in these cases to their Decision in the matter here before the Court as Appendices J, K and L.

Massachusetts Courts have ignored the statutes governing a citizen's rights in the nature of mandamus to appeal the unlawful actions of the City's zoning administrative bodies, the Boston Redevelopment Authority (BRA) and the Boston Zoning Commission (BZC). In the three prior cases they have filed, the petitioners have delineated serious violations of their fundamental right to a rule of law, and the Boston' zoning agencies' disregard for their responsibilities to the public in the subject case.

Courts below dismissed the subject case (and the other three) because they ruled that the petitioners lacked standing. The facts as presented here and in the earlier decisions from 1990, 1993 and 1999 have not received any factual scrutiny by the courts. Judicial review was forestalled by their imposition of "standing" conditions that radically reinterpret the statutes. The state courts have ignored petitioners' constitutional and common law rights. The Courts did not address the mandamus issue in their decisions. It has been the contention of the Petitioners that when constitutional issues

are raised the issue of mandamus relief was appropriate since it was the officials charged with administrating the zoning laws who were not adhering to the statutes governing the exercise of their duties, and depriving the petitioners of their fundamental right to a rule of laws.

The Material Facts

The petitioners Oscar T. and Kathryn J. Brookins are residents and property owners in the Mission Hill Zoning District of Boston and the publishers of the ***Mission Hill News***. On July 27, 2001, the petitioners filed an appeal in Suffolk Superior Court against the Boston Zoning Commission ["BZC"], the Boston Redevelopment Authority ["BRA"], the President & Fellows of Harvard College ["Harvard"] and the Mission Hill Neighborhood Housing Services ["MHNHS"] on the grounds that the respondents had engaged in illegal "spot zoning" and "contract zoning." Petitioners alleged that the amendments themselves and the process that led to them were a violation of the Petitioners' constitutional right to due process of the law and the equal protection of the laws; they also filed against Harvard for violating the trust their Charter had placed in them by using endowment funds to support political fronts for politicians and to pay extortion to politicians to acquire the subject zoning amendments. An amended complaint was filed on Aug. 3, 2001. App. 7-38.

Harvard and the BRA have engaged in thirteen years of community machinations to cover the exaction of property from Harvard for zoning exceptions. In 1989 Harvard announced their intent the transfer their 9.6 acre ledge site at Brigham Circle for the give-away price of $2 million to a sequence of beneficiaries; the nonprofit Mission Hill Neighborhood Housing Services "MHNHS" from 1989 until 1996, when the Northland Development Corp. was given a prospective 85 percent partnership, with the MHNHS retaining a 15 percent interest; and finally Jerome Rappaport's New

Boston Fund that joined the other two with an 85 percent principal ownership and a $10 million investment. Northland retained a 10 percent interest and the MHNHS was reconstituted as a for-profit MHNHS, LLC with a 5 percent interest in a new entity One Brigham Circle, LLC.

The Rappaport family is infamous as the "developers" who demolished Boston's West End community in 1968. The $2 million sale price that was established in 1989 was the amount Harvard received for the property in 2001. The project has a 35-year lease with Partners Health Care for $40 million a year or $1.4 billion for the life of the lease.

Petitioners are also aggrieved in the traditional zoning sense of the word by the traffic on Parker Street, where they own a condo and a three-family house. The expansion in the Medical Area has heavily burdened the small, old residential streets in Mission Hill. In addition to their residence at 4 Hillside Street, the Petitioners' own property at 743 Parker Street and at 803 Parker Street. Parker Street is a narrow street and one of the oldest in Boston. In places it is 19 feet wide and the sidewalks only 4 to 5 feet wide. The congestion on the major arteries has heavily impacted residential streets because motorists see them as providing a faster alternative to remaining on the main arteries such as Tremont Street that is sometimes blocked, thus burdening the residents of these streets with traffic, air pollution and unsafe conditions. In Vokes v. Avery Lovell, Inc., 18 Mass. App. Ct. 471, 482-483 (1984) circumstances such as the petitioners' face on Parker Street were deemed sufficient to grant standing to the petitioners. App. 75.

The subject zoning amendments to the Mission Hill Zoning Code established a Planned Development Area for the 9.6-acre ledge site at Brigham Circle owned by Harvard. These amendments allowed the construction of a 117,000 sq. ft. medical office facility with an underground parking garage for 255 cars for Partners Health Care, Inc., an administrative umbrella for the Brigham & Women's Hospital,

Mass. General Hospital and other health care facilities. The project also includes 62,000 square feet of retail space and surface parking for 130 cars. (App. 1387) The ownership of the parcel transferred to One Brigham Circle, LLC. "OBC" on December 11, 2001.

The upper part of the parcel is a 5.1-acre, passive park that is also touted as a "community benefit." It is owned by a nonprofit entity, "the Friends of Puddingstone Park," controlled by the three directors of the One Brigham Circle, LLC partnership. The BZC approved these zoning amendments on the recommendation of the BRA without adequate information available to the public or to them before they gave their approval. The project itself is massive and totally out of keeping with the surrounding commercial space and properly belongs across the street in the Longwood Medical Area because it is used as medical facility. Petitioners' complaint charged that the respondents engaged in illegal "spot zoning". The subject development is an improper intrusion of Medical Area uses into the Mission Hill Zoning District. App. 185-244.

In 1989 Harvard first offered their ledge site to the MHNHS for $2 million. It took them until 2001 to figure out how to effectuate the sale of the property. (App. 22-25) It turns out that exchanging Harvard property for the City's zoning approvals wasn't easy, especially when the people of Mission Hill were opposed to both Harvard and the MHNHS, Harvard's chosen representative in Mission Hill. App. 75-79.

On May 8, 2001, after a public hearing of the BRA Board at which the petitioners' and others, presented oral and written testimony in opposition to the project, the board voted to approve the Planned Development Area for the One Brigham Circle at Harvard's Ledge Site, and authorized its Director to petition the BZC for approval of the development plan and Map Amendment. App. 185-205.

At public hearing on May 30, 2001, petitioners and others presented oral and written testimony opposing the project, to the BZC Board. The Board did not have a quorum to vote at the public hearing, so they voted on June 27, 2001 to approve the development plan for Harvard's ledge site and map amendments. On the same day Mayor Menino signed Map Amendment No. 390 and the PDA No 52.

For the BZC to legally exercise its legislative function both sides must be heard, but the BRA did not include the letters from opponents of the project in the documents they sent to the BZC. The BRA never made available a certified site plan so that the citizens assembled in numerous small meetings to discuss the project had no way of assessing the size of the project they were discussing. The size of the project simply does not meet the requirements of the PDA guidelines that a project must be in keeping with its surroundings. The absence of a site plan for the project was noted by Adam Schulman of the Boston Transportation Dept in his written comments to the BRA. Petitioners never saw a site plan of the project. App. 90-92.

The evidence presented at the public hearing did not address anything other than community approval. MHNHS Director since 1976, James Hoffman spoke on behalf of the project. Here are excerpts from the minutes of the hearing: *"Mr. Hoffman . . . stated that there was enormous community support for the proposed project and a very extensive community review process."*

"Commissioner Fondren asked why the need for a PDA and was there money allocated to maintain the proposed open space." Mr. Dragat of the Northland Development Corp. responded *". . . when the Mission Hill zoning was done, the planning for the project was already underway. The PDA regulations in Article 59 were designed with this project in mind . . . The project is obligated to maintain the open space, but an entity of some sort may be created with the Parks Dept. or the Boston Natural Areas Fund to maintain it in*

perpetuity, There is an endowment already in place for funding."

Four Mission Hill residents spoke in favor of the project: Patricia Flaherty, who was then the President of the MHNHS; Maryanne O'Keefe, who is now the President of the MHNHS and Ms. Flaherty is now a salaried employee; Richard Giordano a member of the MHNHS and aide to Rep. Kevin Fitzgerald; and Fred Ficken also a long time member of the MHNHS spoke.

Three residents spoke in opposition, including petitioner Kathryn Brookins; her complaints were the same then as now. The vote on the project took place a month later, on June 27, 2001 at a business meeting that was "open" to the public but the public was not given notice of the meeting. Commissioner Fondren stated that at the public hearing there was "*strong support for the petitions as well as some opposition*". The vote was unanimous.

A Planned Development Area does not meet the standard set in Nectow v. City of Cambridge, et al, 277 U.S. 183, 48 S. Ct. 447, 72. L. Ed. 842, 1928 U.S. LEXIS 683 that, "*The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of its use is not unlimited, . . . such restrictions cannot be imposed if they do not bear a substantial relation to the public health safety, morals or general welfare. . .*". It certainly does not bear a positive relationship to morals; the ability to tailor zoning to meet the needs of individual landowners such as Harvard as shown in the testimony of Mr. Dragat above does not meet this standard. He said, ". . . *that when the Mission Hill zoning was done, the planning for the project was already underway.*" The new Mission Hill Zoning District was in "community process" from 1989 until 1996 when the zoning it recommended was approved. The "process" was conducted by a Planning and Zoning Advisory Committee ["PZAC"] then a Interim Planning Overlay District ["IPOD"] appointed by the

Mayor and selected from the membership in the MHNHS. In the case before this Court the petitioners have shown that in the public processes "countless meetings" there was no meaningful input. Community members were talking but what they said didn't matter because there was not one vote in 14 years of community meetings. The president of the MHNHS, Kelly Farquharson, was also the Chairman of the PZAC/IPOD that held secret meetings, kept no minutes and had no quorum requirements.

Harvard asserted that they were not the developers of the project although they were the owners. Harvard cannot argue that Northland or the New Boston Fund as partners in the One Brigham Circle development were involved in the zoning process to assure that "the planning for the project was already underway," since these entities were not on the scene when this "community planning" took place. In our request for the production of documents to the BZC attorneys for all information before the BZC Board when they voted we received a very slim packet indeed, containing nothing on which to review the project with understanding. The information provided was clearly not a sufficient basis to make an informed decision on "unique" zoning amendments for a $40 million project. App. 83-87.

On July 26, 2001 Partners Health Care signed a lease for all the proposed office space and the 255-car parking garage at Brigham Circle. It was not known until all the zoning permits were approved that the facility was to be used by a medical institution. Partners is an umbrella organization for the Brigham and Women's Hospital (BWH), Massachusetts General Hospital and other medical facilities. The use of the facility as an adjunct to the BWH violated what had been a long standing agreement between the medical institutions and the Mission Hill neighborhood that the institutions would not site their facilities in Mission Hill which lays to the east of Huntington Avenue. App. 93-103.

The medical institutions' use of the ledge site should have required that it be included in the Brigham and Women's Hospital Master Plan and subject to the limitation on parking in that area, 0.7 parking spaces per 1,000 sq. ft. of development. The BRA has recently included properties outside the former boundaries of the Longwood Avenue Institutional District and to the east of Huntington Avenue in the Master Plan Zoning of the Medical Area. In the instance herein under review it was in their interest not to. The BRA's plan for the medical area seems to be to no advanced planning.

On Sept. 12, 2001, One Brigham Circle, LLC. (OBC) filed an Emergency Motion to Intervene. On September 20, the Court allowed the Motion without Petitioners being given notice and permitted an opportunity to file an opposition to the Motion. Petitioners complained and were given an opportunity to object. The Court then allowed another Motion to Intervene on Oct. 11, 2001. OBC had no documented relationship with the project at that time. [App. 39 and appended here] The OBC was not an owner of the property until Dec. 11, 2001, nor did they offer a purchase and sales agreement to establish their claim of interest in the proceedings.

It is contrary to the law and practice to allow the issuance of a building permit when a complaint is pending against the decisions of a zoning board, Harvard's project received a building permit. Massachusetts' statutes state that a person aggrieved has 30 days to challenge a zoning amendment. Once the complaint if filed no building permit can issue until the legal challenge to the project is resolved. The commencement of construction while the petitioners' complaint had not been resolved is a serious breach of the petitioners' right to due process.

On October 28, 2001 the designated developers made application to the City's Inspectional Services Department. (ISD) for a full building permit for the project. The ISD issued a "stop work" order on October 29, 2001 stating, "Present

procedure is in violation of the requirements of the Zoning Ordinance of the City of Boston and the Massachusetts Building Code." The remedy for this violation was to "stop all work and furnish design review approvals as required by Article 80, Section 5." Article 80 Section 5 states, "Except as otherwise specified in this Article, where conflicts exist between the provisions of this Article and the remainder of this Code the provisions of this Article shall govern, notwithstanding any contrary provision of this Code." App. 48.

ISD were looking for the "site plans" that had never appeared in all the official filings. Asserting the supremacy of the BRA over the ISD, BRA Director Mark Maloney wrote Kevin Joyce, Commissioner of the ISD a letter, in regard to the One Brigham Circle project dated October 31, 2001. This letter states, in part, "***I hereby issue this certification of Compliance for the Proposed Project pursuant to Section 80B-6 of the Code. . . In Accordance with the above findings and the May 31, 2001 BRA vote, I hereby issue this Certification of Consistency for the Proposed Project pursuant to Section 80C-8 of the Code.***" Section 80C-8 is the requirement for the information usually incorporated in a site plan. "(a) size, including gross floor area, building height, and FAR; (b) uses; and (c) location, including the location of each proposed building and use." Building inspector Harry McGonagle declared the violation corrected on November 11, 2001. App. 49-50.

When the petitioner, Kathryn Brookins, learned of the issuance of the building permit in February 2002, she went to the building department and spoke to Gary Moccia, Deputy Building Commissioner at the ISD. ***"I asked him what usually happens when a zoning amendment or decision of the BZC is challenged in court. He responded "The City's Law Dept. calls us. They didn't call."*** App. 45.

Once the "Permit to Build" was issued Harvard was ready to transferred deeds for the two parcels of land at the Ledge Site. On December 11, 2001 a new for profit entity, Mission

Hill Neighborhood Housing Services, LLC. ("MHNHS, LLC"), with its partners, took title to the to 141,125 sq. ft. of the lower portion of the property as a for-profit corporation called One Brigham Circle, LLC for $1 million. App. 45.

On December 13, 2001, Fleet Mortgage gave OBC, LLC a construction mortgage for $40 million, although the estimated cost of the construction on the building permit is for only $22,322,000. App. 60-69 and 47.

On January 23, 2002, a private not-for-profit entity, the Friends of Puddingstone Park, Inc., paid $1million for the remaining 5.5 acres of the property zoned open space and touted as a passive park. The directors of the OBC partnership are the only members of the private nonprofit organization. Interestingly the Articles of Organization state that *"Under no circumstances shall the corporation take any action that would transform the character of Puddingstone Park from a passive public park for public use to property held for any other use or purpose*." Under the ownership of these "Friends", Puddingstone Park was used as a dumping ground for thousands of tons of granite ledge that the OBC blasted out of the lower site so that their bottom level of parking garage would be at grade level with Tremont Street. The plans for the project that show the slope leading up to the top of the ledge as undisturbed natural area could not be more untrue.

The Court denied the petitioners' request for a temporary restraining order on February 5, 2002. At the February 12, 2002, hearing on petitioners' motion for injunctive relief, the Court observed,

> *"It seems that ultimately what you're suggesting, although you haven't used the term, but it seems to me you're arguing that there has been a long-standing, in essence,* ***civil conspiracy*** *between the BRA and Harvard to develop Mission Hill or this particular parcel, that they had in essence co-opted the Mission Hill Neigh-*

borhood Housing Service to become their puppet for community input; and that they have redrafted the zoning laws or regulations that apply to Mission Hill so as to permit what we're now seeing by of expansion and development". (Emphasis added.)

Ms Brookins, "You said it very well. Thank you".

App. 134-135.

Despite the illegal issuance of a building permit to the developer and the commencement of construction on the project, the Court dismissed the petitioners' request for a Temporary Restraining Order and their Motion for Injunctive Relief solely on the basis of standing. The Judge signed his Memorandum of Decision on Petitioners' Motion for Preliminary Injunction, on February 12, 2002, the same day as the hearing on the motion. [App. 43 & 107-109].

All respondents filed for Summary Judgment on March 5, 2002 thereby forestalling discovery by the petitioners. A hearing was held on September 20, 2002 and Memorandum of Decision and Order on Defendants' Motion for Summary Judgment was allowed on May 3, 2003. A Judgment on Findings by the Court was entered on June 5, 2003. The petitioners filed an Appeal on June 20, 2003. The project was completed by the time the Judgment on the Findings was entered. App. 47.

The evidence before the Court shows that the sale of Harvard's ledge site was contingent on the issuance of the building permit for the project that benefits both of Harvard's chosen developers, the New Boston Fund and Brigham & Women's Hospital.

The respondents have never refuted the facts of the case as outlined in petitioners' court filings.

ARGUMENT

Harvard and their affiliated hospitals have needed many map amendments and variances to build approximately four million square feet of new medical facilities and three thousand new

parking spaces in their 205-acre Longwood Medical Area. The concentration of medical facilities in one area may be desirable for the City of Boston, as they do generate jobs. However, these institutions are all tax-exempt so they do not provided a commiserate increase in property taxes, thus placing all the burden for sustaining municipal services on the taxpayers of Boston, who in some instances have seen their taxes increase 500 per cent since the medical area construction boom began. The BRA as the City's planning agency has erred in allowing all this new construction without requiring that new infrastructure is put in place to accommodate the increased development. The City's planning agency, the BRA, has seen fit to promote development, not to plan or prepare for it, with deleterious consequences for the City.

The subject zoning, a Planned Development Area, PDA, is unconstitutional, it violates all the fundamental principles of zoning. A PDA is a parcel of land that is given the right to be unique through a process of review by the BRA. It does not meet any of the articulated constitutional standards for zoning laws and violates the petitioners' right to the rule of law.

The Constitution of Massachusetts, Part the First, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, Article XXX. It says, "*In the government of this commonwealth, . . . the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not men.*"

The subject zoning amendments to the Mission Hill Zoning District are under the Boston Zoning Code, Section 80-1. Purpose of the Article. "*The purpose of this Article it to provide clear, predictable, and unified requirements for the review of development projects throughout the city. These review requirements also provide important opportunities for community involvement in development review activities that affect the quality of life in the city.*"

This article outlines requirements for review, not a plan of development that is fixed for any site qualifying for an Article

80 review. Importantly this is a law that mandates the "review of a development proposal" without imposing constraints on what may be built. It is simply a plan for planning, which is not the same as a plan for land. The BRA is constrained only to "provide opportunities for community involvement" ostensibly to address the "quality of life in the City".

It is a zoning designation for a site that gives the BRA the right to decide what is to be built on the site. Instead of the rule of law, there is a rule of men. In the decision taken by the ZBA Board the only rationalization for their approval was simply that there had been "community involvement." The "flexibility" leaves the approval of a zoning amendment entirely up to the discretion of the BRA to promote whatever plan they like and call it economic development, thus providing the BRA with the opportunity to negotiate the sale of zoning approvals. This is zoning sleight of hand that invited the quid pro quo that petitioners document in the exchange of zoning approvals to political fronts for Boston's politicians. App. 208-219.

The petitioners participated in years of meetings addressing Harvard's ledge site development. Citizens were concerned with quality of life issues but the facilitators hired to conduct these "community meetings'" were expert in ignoring their concerns. The "community involvement" turned out to be an enormous waste of time for the citizen participants. In 1994-1996 Harvard provided $180,000 to fund all-day workshops to determine the community's "vision" for the ledge site in which the participants had no rights to reject what was proposed and ultimately what was recommended by the "community" was not what was built. The distinction between "involvement" and "control" is critical in zoning decisions. Unfortunately specious "community process" has been substituted for the fixity of law.

"Community process" is the sole rational required by the statute for the issuance of the subject zoning amendments. Harvard's money maintained the MHNH as their represen-

tatives in the Mission Hill community, when a "community" needed to show up the officers and members turned out to represent the Mission Hill community. Instead of representing the interests of the residents of Mission Hill the MHNHS spearheaded Harvard's push into the community as they were paid to do. App. 77-81

> *"In the decision on Summary Judgement the Court has ruled that, The Brookinses allege a procedural due process argument. However, the BRA and BZC have acted within the procedures laid out in the Code, Section 80C-1, PDA Review/The Brookinses have had opportunity to participate in the review process, attend meetings, and review documents. After comment periods, in open meetings, the BRA voted to Recommend the map amendments to BZC . . . the BRA and BZC have not violated the Brookinses due process rights where they afforded them opportunity to participate."*

As written this statute is a revolution in zoning law. Nothing is fixed and all you have to do to get community approval for your project is find a community group and start subsidizing them. This might be contrary to the interest in furthering economic development, however, since none of them will ever have to work again. It is the rule of men not laws.

Standing

The Supreme Judicial Curt ended "rights in the nature of mandamus' in zoning cases in their decision in Laura Green v. Board of Appeals of Provincetown, 404 Mass. 571, (1989) when they overturned an Appeal Court decision on the same case, 26 Mass. App. Ct. 469, (1988). The SJC ruled that,

> *"The Appeals Court has in effect preserved the right to seek enforcement of the zoning law by an action in the nature of mandamus but has recognized that following the adoption of the Zoning Act in 1975 (St. 1975, c 808, para 3) that right must be exercised within the administrative structure and right of subsequent judicial re-*

view prescribed by G. L. 40A. See Brady v. Board of Appeals of Westport, 348 Mass. 515,519 (1965), as to the common law to seek enforcement, and Vokes v. Avery W. Lovell, Inc., 18 Mass. App. Ct 471, 482-483 (1984), as to the use of an initial administrative proceeding rather than a solely judicial route to seek enforcement of zoning regulation. ***If the Legislature had intended that a nonaggrieved person could compel zoning enforcement by an appeal to the board of appeals and then to the court, it could easily have said so****. Id. Italic added.*

The law did not have to incorporate "mandamus" into G.L. 40A, it had a separate and well-recognized existence.

. . . "We reject the view that word "aggrieved" as applied to a person means different things in different parts of G. L. c 40A. If a nonaggrievel person could compel zoning enforcement by an appeal to a board of appeals and then to court, it could easily have said so. Id . . . The Appeals Court recognized but elected not to follow statements in its own opinions which tend to support the view that, in the circumstances of a case like this, a person must be aggrieved in order to obtain relief through the administrative and judicial appellant processes."

It is of note that the "new" zoning law referred to in the SJC's Green decision had been in existence since 1975 and prior to 1989 the courts had not seen fit to eliminate mandamus. Without the rights to mandamus in zoning cases there is simply no remedy at law left to challenge unlawful actions of the City's administrative officials charged with administering zoning laws. Mandamus provided access to citizens complaining to the courts about the actions of administrative officials. Absent the citizens' rights of mandamus the courts are deprived of the information of administrative wrongdoing that only citizens can provide. This information of administrative wrongdoing is critical to a just society. The peti-

tioners' argue that if there was a statute that said that the "right in the nature of mandamus" still exists, they do.

Massachusetts General Laws Chapter 249: Section 5. Action in the nature of Mandamus. "*A civil action to obtain relief formerly available by writ of mandamus may be brought in the supreme judicial or superior court or if the matter involves any right, title or interest in land in the land court. . .*"

The Appeals Court in their decision of the case here before this Court suggests in a footnote that,

> "*We have been informed that this is the fourth time that the plaintiffs have brought an action challenging a development in the Mission Hill Area, and that, in each case, they were found not to have standing to bring their claims. The plaintiffs are to be reminded of the potential for sanctions to be imposed upon those who file vexatious lawsuits and appeals . . .*"[1]

It is in the public interest for the Courts to assure that when the Legislature sets a policy, the Legislature's policy prevails, not a different policy set by the courts. This statute is no

---

[1] The Court appended the decisions from earlier cases to its decision on the case petitioners seek to have reviewed by this Court. All the cases had unusual legal fates: In the first case the Court ordered the petitioners to post a bond to indemnify the respondents for the time they lost waiting the outcome of the case. But in that construction project, like the one here before the Court, the respondent Harvard had completed construction of its underground parking garage for 525 cars, when the bond was ordered and the building and garage were completed. The case itself was "lost" in the Suffolk Superior Court and despite the petitioners having filed many motions to restore the record none of the motions was ever heard and the record was never assembled for an appeal. In the second case the appeal brief was rejected by the Appeals Court for not conforming to proper form but the petitioners were not told how it failed to conform. In the third case the petitioners' property was on the same 19' wide street about 120 foot distance from the property getting the variances that they were challenging; they were deemed not to be aggrieved and therefore not to have standing. Their appeal was denied. This is the fourth case.

longer honored in zoning cases. Despite the fundamental rule of statutory construction that all other rules are subordinate to the intent of the legislature, if that intent can be ascertained. The governing statute is perfectly clear however the consequence of the Laura Green, supra, decision has been absolute and has in effect eliminate the statute.

Petitioners have met the stricter standard set in *Vokes v. Avery W. Lovell, supra.* And have argued that they have exhausted all opportunities to complain to the respondents that the planning process and the project as planned violated basic principals of planning and governance.

The petitioners who complain that their streets are gridlocked, their air polluted and their green space lost is at the mercy of courts that rule that because these public goods are public there is no individual alone has the private right to them and hence no right to attempt to protect them in court from unlawful development. Increasingly the courts have ruled that there is no one who has legal standing to demand that they have a private right to access their property or the air they breath. The concept of "economic development" rules the courts, an economic understanding of what constitutes economic development is unfortunately missing.

The respondents have devoted a great deal of time and energy to perpetrating the masquerade of their private advantage being a benefit to the public. The courts by their taking into account private benefits to individual developers as if they are public goods invites the charge of unequal treatment of individuals who suffer public harm but are denied the right to contest these harms, because the public sphere is public. The courts have allowed the presumption that it is possible for harm to the public in terms of traffic, air pollution and congestion be offset by "community benefits" that do not meet the standards of public goods. They are merely resources extorted by public officials from the developers in order get their zoning approvals. The allocation of "community benefits" is politically controlled. These re-

sources are at the disposal of politicians to reward their friends. Who gets an "affordable" house? A private person and the public have no right to know to whom it is given.

There was no discernable advantage to the public from the sale of Harvard's ledge site to OBC or the construction of the development at One Brigham Circle. The public benefits alleged were in fact private benefits. Individuals got jobs, not the public. The community did not buy the development at $1 million with a guaranteed lease for $40 million a year. Jerome Rappaport did.

Planned Development Area challenged here violates the petitioners' right to the due process of the law, the equal protection of the law; and constitutes of "spot zoning" and "contract zoning".

Contract Zoning

Interestingly Harvard has argued vociferously that they are not the developers of the Ledge Site at Brigham Circle although the testimony that John Dragat gave at the BZC hearing on May 30, 2001 was that the planning for the subject development began when the PZAC/IPOD was "planning" new zoning for Mission Hill. This refutes Harvard's claim because at the time that the rezoning was taking place Harvard was paying the MHNHS $180,000 to conduct for "community process" to decide what the community "wanted" on the ledge site. Their claim of noninvolvement in their ledge site property was swallow whole by the Courts. Although they have never denied that they had an agreement with the BRA to sell their ledge site to the MHNHS in exchange for "zoning considerations" in the medical area. Harvard argued over the years that the "gift/sale" its ledge site at a below market price was a "community benefit" being conferred on the community. They are not talking about selling it to a "for-profit" developer in 2002 at the same price $2 million they were charging the community in 1989. The zoning changes in the Medical Area have been predicated on the transfer of

institutional properties to private entities such as the MHNHS and the Roxbury Tenants of Harvard.

The first such transfer took place in 1986 when the Brigham & Women's Hospital "gave/sold" its nursing home to the MHNHS. These zoning changes have been "necessary" for the massive expansion that has taken place in the 205-acre Longwood Medical Area since the respondent BRA announced their strategy in the Boston Globe newspaper article on June 5, 1986. The headline reads "*Hospital sells $800,000 building to a community group for $20.*" The article lauds the hospital for its gift to the "*community.*" BRA spokesman Larry Koff is quoted as saying "*it was apparently the first such gift of real estate in the city.*" And further Koff said, "*the city used its approvals of the hospital's new parking garage and research center as leverage for the donation of its former nurses dormitory . . .*" Quoting Koff, the Globe said "*potential candidates for similar deals included the so-called quarry site, six acres of Harvard owned vacant land in Brigham Circle.*" This article says in the clearest terms that if the medical institutions want to build in the Longwood Medical Area they must pay political fronts such as the MHNHS by "*donating*" property to them and that the BRA has "*leveraged*" such donations. App. 22.

The MHNHS is a political organization that masquerades as a community based nonprofit. The MHNHS has been the designated beneficiary of medical institution largess and governmental grants since the inception of the "*gift/sale*" process for getting "*community support*" by giving to this "*community organization*" was touted in the Boston Globe article. The hospital's gift of their nurses home has provided the organization with a steady income flow but has been of no benefit to the "community". The income from this property is siphoned off via high management and maintenance fees paid to their management company.

Surely soliciting "*donations*" is a deviation from the "*procedural and substantive*" obligations of the BRA as the City's planning agency.

There is no reason to suppose that Harvard did not do what they said they were going to do, "exchange the Ledge Site for zoning considerations in the medical area." Harvard's Associate Dean for Planning and Facilities, Eric Buehrens' in his Affidavit testifies that, "Harvard was not an applicant or petitioner and not participate in the processes that ultimately culminated in the Zoning Decision." [App. 1297] He had apparently forgotten Harvard's funding of the MHNHS for the community process in 1994-1996 that is part of the basis on which these subject amendments are legitimated in the BRA & ZBA filings decisions and that their agreement to sell their ledge site to the MHNHS kept the organization in business.

It is necessarily the case that Harvard, as owner, was a participant in the request for zoning changes and building permits. It is significant that Mr. Buehrens would bother to argue that Harvard was not the owner of the ledge site when the approvals were granted, but that is the sham that the Court used in dismissing the petitioners charge of "contract zoning". Ownership is an either or proposition, like pregnancy. Harvard did not transfer title to the properties until after the permits to build were issued. This is eloquent testimony to Harvard's involvement in the entire process.

The Trial Court in its May 5, 2003 memorandum granting the respondents' motion for summary judgment does not touch the matter of ownership implying control. The Court says in its decision,

> "*Contract zoning only occurs between the developer and the municipality here OBC and BZC. Harvard was not the developer, but the owner of the property and therefore not a valid party to a claim of contract zoning. OBC, as developer and party to the purchase and sale agreement with Harvard is the valid party . . . Brookinses have provided no evidence that OBC*

was involved in an exchange of development rights with the BZC . . . For the foregoing reasons, the defendants' motion for summary judgement on Count I is ALLOWED." Decision appended

The Court sets up a straw to knock down. The actors in this drama were the BRA and Harvard. Petitioners not only presented no evidence that the BZC or OBC exchanged anything, they never presented any such argument. There is plenty of evidence that Harvard and the BRA were exchanging zoning for property. It is contrary to law to issue zoning changes solely for the economic benefit the owner of property.

Both Harvard and OBC clearly expected that their economic advantage would be contingent on the granting of the amendments. The purchase and sales agreement between Harvard and OBC has not been available to the petitioners, nor they aware of its presence in Court. The Court's decision rests on a conceit that things are not what they seem and Harvard did not do what was proposed in the Koff article.

The facts presented by the petitioners to the trial court for review here are different in kind from cases that are the established case law in Massachusetts. Petitioners have a unique case. All prior cases involved the developer of a project making a contribution to the subject municipality to "mitigate" the impact of the proposed development for which they were seeking approvals from the municipality. In the matter before this Court the process has been long and complicated, but completely focused on the goals that the BRA outlined in 1986 and with which Harvard concurred in 1989. App. 22-25.

Unlike the instances of contract zoning that have been found legal in Massachusetts case law, the facts here do not involved the transfer of property to a municipality, where its allocation might theoretically be under some sort of public surveillance and public benefit insured. The BRA has an extraction policy for developers and in this instance the developers paid $465,356 in Housing Linkage and $91,996 in

jobs linkage. In the case presented here the property was designated for a "community group" that had ceased to function in that capacity. Its sole reason to exist is its special relationship with Harvard which has caused considerable public outrage and concern but has also provided immeasurable benefits to the small cadre of its members who are given many advantages as a result of their participation in the Fitzgerald organization.

The Koff proposal was accepted in a letter dated March 6, 1989 to the then Dean of the Medical School, David Bray from Harvard's Director of Planning, Kathy Spiegelman. It acknowledged a "strategy" for the sale of the 9.6-acre ledge site at Brigham Circle to the MHNHS for $2 million. To quote, ***"[State] Representative Kevin Fitzgerald, [City] Councilor David Scondras and Don Gillis from the Mayor's Office of Neighborhood Services have all acknowledged that the MHNHS is the appropriate organization to work with us on the disposition of the property."*** App. 23-25.

In 1989 petitioner Oscar Brookins was a member of the board of the MHNHS but was unaware of the private meetings between other board members and Harvard's Kathy Spiegleman. The concerns that the petitioners shared with many other residents of Mission Hill were outlined in two letters to the then President of Harvard Derek Bok, dated April 7, 1989 and April 3, 1990 signed by June Howe, President of the Mission Hill Neighborhood Association, and drafted with the Brookins' help. The same issues were expressed by a large contingent of Mission Hill residents later that year in a public meeting held by Ms. Spiegleman. [App.77-81].

Spot Zoning

The 1976 Federal Clean Air Act designated a parking restriction zone, that limited parking for residential use only, to be included in the underlying zoning for the area of Boston that includes the Longwood Medical Area. The underground

parking garages built in the medical area are all in violation of the 1976 Federal Clean Air Act and the parking restricted district that is mandated by it.

The problems of traffic and air pollution has been one focus of concern in three of the four suits that the Petitioners have brought against Harvard, the BRA and both the Zoning Commission and the Zoning Board of Appeals.

In the trial Court's Memorandum and Order on respondents motion for summary relies on misapplication facts to reach the conclusion that, ". . . *to succeed with a challenge based upon spot zoning, the plaintiffs must demonstrate that the BZC adopted the Map Amendment without a well considered plan for public welfare and solely for the economic benefit of the owner of the land affected by the Amendment.*" The Brigham & Women's Hospital "BWH" had an Institutional Master Plan but their facility in the Mission Hill Zoning District isn't in it and clearly their economic advantage was in not being in it.

In a "BWH" publication touting the hospital's move into OBC, BWH Pres. Gary Gottlieb touts the hospitals planned institutional use of the OBC development, "*'With our move across Huntington Avenue comes the opportunity for BWH to allow our facilities on Francis Street to more comfortably provide spectacular clinical care and support. . .*'" [App. P. 1345].

Planning for institutional use was to be done through the Institutional Master Plan process and limited to the Longwood Avenue Medical Area Zoning District on the western side of Huntington Avenue. But the subject site is its own PDA on the eastern side of Huntington Ave. The purpose of Master Planning was to give coherence to the expansion in the medical area. The BWH Master Plan clearly shows [App. Pg. 1349] that the area labeled "*Ledge Building One Brigham Circle*" is included in their institutional use planning.

Clearly the ledge site development has greater economic value to the hospital out of their Master Plan District than in it. Because if it were in the Longwood Area Master Plan District they would have to have limited their parking to 0.7 spaces per 1000 sq. ft. of office space whereas in the OBC PDA they were allowed more than 2 parking spaces per 1000 sq. ft. of the project.

Breach of Trust

Harvard has excelled itself in sophistic arguments to refute the petitioners' charge that they breached their trust in using endowment assets to pay bribes to politicians. Petitioners simply say that Harvard has violated the trust placed in them by their Charter and the Constitution of Massachusetts. Harvard's endowment should not be given to Partners Health Care, the Brigham & Women's Hospital or the MHNHS. Such actions are not in the educational interest of their students.

Petitioners' asked the trial court to enter judgement that Harvard has abused its endowment by engaging in activities that are contrary to their educational trust and award the Petitioners' their coerced contributions to Harvard College, a sum of $86,000. App. 14

Harvard's Charter dates from 1650 and does not fit into the silly arguments they put forward to ward off the scrutiny of the Courts. The Courts accept Harvard's straw that they are neither a public trust where the Attorney General is the only person with jurisdiction, nor a private trust and the petitioners do not have standing there either.

In 1994 Harvard agreed to provide the MHNHS with $180,000 to conduct "community processes" to chose a developer and determine what the "community wanted built" on the ledge site. Harvard's money maintained the MHNHS in existence when their stated reason for existing in their nonprofit filings had long since disappeared. The MHNHS was organized in 1978 to provide home improvement loans to

homeowners who could not get such loans from banks. It made one loan from 1986 until 2003.

The Petitioners have two daughters, Mary Laura Brookins, (Harvard class of '96) and Julia A. Brookins (Harvard class of '98) who were undergraduate students at Harvard from 1992 through 1998 and denied necessary and appropriate financial aid at the same time that Harvard was funding the MHNHS. App.26-28.

When parents send their children to Harvard it is an act of trust and when donors give money to Harvard it is an act of trust. Harvard has violated this trust. Harvard says it basis the amount of financial aid that it gives students on their "need". Throughout petitioners' daughters' years at Harvard they questioned how this need was determined. While their daughters' were there, Harvard took 60% of the girls' outside scholarships that they had been awarded from the Boston Latin School where one of the girls graduated valedictorian and the other nearly so. The donor expected that he was giving the valedictorian a full scholarship to Harvard.

The price at which the MHNHS was to purchase the Ledge Site from Harvard was fixed at $2 million in 1989. The transfer of Harvard's property to One Brigham Circle, LLC for that prospective sales price was an insult to the students of Harvard paying high tuition fees in 1989, it was an even greater insult in 2001when the same price was paid in two separate $1 million transfers.

Due Process

The Boston Zoning Code is ignored in the regulation of large developments to which no fixed laws apply. The restrictions the court place on a petitioner's rights to challenge a zoning decision of the administrative bodies has become insurmountable. Respondents such as Harvard are free to give/sell their property to community groups that act as fronts for politicians in exchange for zoning relief.

The foundation of "Due Process" is the rule of law and absence due process there is no equal protection of the law. The evidence before the Court detailed many critical violations of the laws of zoning and in the payment of funds to affect the decisions of governmental entities. The petitioners are entitled to the rule of law being respected in the Courts.

The petitioners asked the Court to consider the issue of traffic congestion in the Longwood Medical Area that prevents the petitioners from using their car for the ordinary daily activities that are taken for granted in most residential neighborhoods and the air pollution that lowers the life expectancy of inner city residents. This traffic congestion is the consequence of the proliferation of parking garages over the past 18 years in the medical area, all of which have required special zoning amendments or zoning variances form the City of Boston's planning and zoning boards. Petitioners have attempted to challenge some of these instances of lawlessness and carelessness in the issuance of zoning variances in two previous court cases, they were ruled to have no standing.

In *Anthony Palazzolo v. Rhode Island, et al.* Justice Stevens has argued in dissenting from the judgement that,

> "*Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and other provisions of state law. If a regulating body fails to adhere to its procedural or substantive obligations in developing land use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. . .*" 533 U.S. 606 (2001)

Planned Development Area review is a process that gives the BRA absolutely discretion. The issuance of permits for large developments such as the subject here is at the discretion of the BRA and the BZC that relies exclusively on the BRA recommendations. This has put the BRA in the position to negotiate sales prices for zoning variances, conditional

uses or zoning amendments. The BRA has never lost a case in the Massachusetts courts. Citizen's objections at the "community processes" are simply listened to but never acted on. Despite extensive public opposition the BRA is free to use these meetings to legitimate their "decisions" to allow projects under Article 80 of the Boston Zoning Code. Absent fixed laws the petitioners are denied their due process rights to the equal protection of the laws.

The Massachusetts Supreme Judicial Court in a self-congratulatory mood said in its landmark decision, *Hillary Goodridge & others v. Dept. of Public Health & others* that,

> *The Massachusetts Constitution protects matters of personal liberty against governmental incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language . . . That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal constitution is not surprising . . . Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'"* 440 Mass. 309, 798 NE.2d 941 (Nov. 2003).

The petitioners fail to see how a court can "protect" individual liberty and not recognize the petitioners' fundamental right to the rule of law, and its applicability to zoning cases.

CONCLUSION

Petitioners have a fundamental right to the rule of law. They have been denied their constitutional rights to "equal protection of the laws" and due process of the laws because institutions such as Harvard, with enough money and political connections, are able to exempt themselves from the laws to which the Petitioners are subject. Thus subverting the rule of

law on which all just societies depend. A thirteen year long "community process" to determine what was to be built on the site was substituted for the rule of law and the petitioners were part of that process and community. In the subject case the only "community" members that mattered were the members of the MHNHS.

The Court below has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower courts as to call for an exercise of this Court's supervisory power.

The evidence before the Court shows that consideration was extracted by the zoning bodies, the respondents BRA and BZC, from Harvard, the owner of the subject site to grant the necessary zoning amendments for this project and other projects in the Medical Area. This constitutes a violation of every principle fundamental to the rule of law going back to the Magna Carta. Zoning law in Boston has become a private good, **something to be bought and sold** not a public good available to all. Certainly if laws are being bought and sold not all citizens have equal access to them.

The petitioners have been denied the equal protection of the law. The Courts have ignored the illegal process by which the subject zoning was acquired and the petitioners' thirteen-year efforts to stop Harvard's "gift/sale" of their ledge site to the MHNHS and the resulting payoff to politicians through this development. The ability to sell the law simply makes rulers too powerful. The loss of the rule of law renders citizens powerless.

Respectfully submitted,

OSCAR T. BROOKINS, *Pro se*
KATHRYN J. BROOKINS, *Pro se*
4 Hillside Street
Boston, MA 02120
(617) 427-4140

APPENDIX

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 4, 2006

Mr. Oscar T. Brookins
4 Hillside Street
Boston, MA 02120

Re: Katheryn Brookins, et vir
v. Zoning Commission of Boston, et al.
Application No. 06A547

Dear Mr. Brookins:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on December 4, 2006 extended the time to and including February 8, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

by /s/ Heather Trant
Heather Trant
Case Analyst

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION

SUFFOLK, ss. [Filed September 20, 2006]

No. 2001-3447

KATHRYN J. BROOKINS, *et al.*,
Plaintiff(s),

v.

THE BOSTON ZONING COMMISSION, *et al.*,
Defendant(s).

JUDGMENT FOR PLAINTIFFS AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P.28)

This action was appealed to the - *Appeals Court - ~~Supreme Judicial Court~~ - the issues having been duly heard and the APPEALS Court having duly issued a rescript, it is ordered and adjudged:

JUDGMENT FOR THE DEFENDANTS ON COUNTS I, II, III AND IV. THE COMPLAINT OF THE PLAINTIFF IS DISMISSED

Dated at Boston, Massachusetts, this 19th day of SEPTEMBER, 2006.

MICHAEL JOSEPH DONOVAN, Clerk/Magistrate

By: /s/ [Illegible], Asst. Clerk

---

* Strike inapplicable words.

* * * *

NOTICE TO PARTIES: PURSUANT TO MASS. R.A.P.26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUDGMENT.

APPENDIX C

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Kathryn J. Brookins
4 Hillside Street
Boston, MA 02120

RE: Docket No. FAR-15646

OSCAR T. BROOKINS & another

vs.

BOSTON BOARD OF ZONING APPEALS & others

Suffolk Superior Court No. SUCV2001-03447
A.C. No. 2004-P-1228

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 09/11/06, the above captioned Application for Further Appellate Review was denied. (Marshall, C.J., recused)

Susan Mellen, Clerk

Dated: September 11, 2006

To: Oscar T. Brookins
Kathryn J. Brookins
Elizabeth L. Bostwick, Esquire
Saul A. Schapiro, Esquire
John Kenneth Felter, Esquire
Martin M. Fantozzi, Esquire

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

04-P-1228

KATHRYN J. BROOKINS & another[1]

vs.

ZONING COMMISSION OF BOSTON & others[2]

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

In the spring of 2001, the Boston Redevelopment Authority (BRA) recommended, and the Zoning Commission of Boston (BZC) approved, a map amendment and a plan for mixed-use redevelopment of a 9.25 acre parcel of land at Brigham Circle in the Mission Hill neighborhood of Boston. This development included retail space, office space, parking, a pedestrian plaza, and a 5.5 acre open park space. At the time, most of the site was owned by the President and Fellows of Harvard College (Harvard), which thereafter sold the property to the developer, One Brigham Circle, LLC (OBC). OBC was formed as an entity by Mission Hill Neighborhood Housing Services (MHNHS) and its chosen development partner, NDC Development Associates, Inc., after a multi-year community planning process.

---

[1] Oscar T. Brookins

[2] Boston Redevelopment Authority; President and Fellows of Harvard College; Mission Hill Neighborhood Housing Services; and One Brigham Circle, LLC, intervener.

In July, 2001, the plaintiffs commenced this civil action against the BZC, the BRA, Harvard, and MHNHS, seeking to invalidate the approval of the map amendment and the development plan on the grounds that these defendants had engaged in impermissible "contract zoning" and "spot zoning," that the passage of the map amendment was accomplished in violation of the plaintiffs' due process rights, and that Harvard had committed a breach of trust. OBC was permitted to intervene as a party defendant.

A judge of the Superior Court denied the plaintiffs' request for a preliminary injunction, concluding that the plaintiffs had no reasonable likelihood of demonstrating that they had standing to pursue their claims.[3] Later, another judge granted the defendants' motions for summary judgment, ruling that there were no genuine issues of material fact, and that the plaintiffs had failed to establish their standing as matter of law. The motion judge also ruled that, even if the plaintiffs could be said to have standing, their claims were legally unsustainable on the summary judgment record.

The primary issue on appeal is whether the plaintiffs, who are neither abutters to the project nor abutters to abutters, may be said to be persons aggrieved within the meaning of § 10A of the Boston zoning enabling act (enabling act), which prescribes the means by which an appeal may be taken from a decision by the BZC to approve a map amendment. See St. 1956, c. 665, as amended through St. 1987, c. 371, § 2.[4] Although we have held that the term "persons aggrieved," as used in § 11 of the enabling act, is to be given the same

---

[3] Because the plaintiffs were denied injunctive relief the project went forward while this action was pending. It has been represented in OBC's brief that the project is now completed.

[4] Under § 10A, "[a]ny persons aggrieved by a decision of the zoning commission approving a zoning map amendment or a zoning regulation or amendment thereof . . . may appeal such decision to the superior court in the county of Suffolk . . . ."

meaning given to that term in the context of appeals from administrative zoning decisions pursuant to G. L. c. 40A, § 17, see *Sherrill House, Inc.* v. *Board of Appeal of Boston*, 19 Mass. App. Ct. 274, 275 (1985), its meaning in the context of § 10A has yet to be decided.[5]

The plaintiffs correctly point out that, in cases arising under G. L. c. 40A, as opposed to the enabling act, the criteria for standing to challenge a zoning amendment are less stringent than those applicable to challenges of administrative decisions granting or denying zoning relief. In *Van Renselaar* v. *Springfield*, 58 Mass. App. Ct. 104, 107-108 (2003), we held that for purposes of standing to challenge local legislation adopting or amending a zoning ordinance or by-law, it is sufficient for the plaintiffs to establish that they will suffer an "adverse impact" from the legislative zoning action, without establishing, in addition, that their injury is special and different from the concerns of the rest of the community, as is required in appeals pursuant to G. L. c. 40A, § 17.

We need not decide whether the same distinction should be made between appeals under § 10A of the enabling act and appeals from the granting or denial of zoning relief pursuant to § 11 of the enabling act, because, even under the less exacting standard described in *Van Renselaar*, the plaintiffs lack standing to challenge the map amendment. On the summary judgment record, the motion judge correctly determined not only that the plaintiffs lacked particularized injury but also that the concerns they alleged—increased traffic, air pollution/ and decreased property values—were entirely unsubstantiated and speculative. Thus, because the plaintiffs failed to show that they suffered any adverse impact from the

---

[5] The fact that the same term is used in both sections is not necessarily dispositive. See *Standerwick* v. *Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 26 (2006) (allegations of injury that may establish a claim of aggrievement under G. L. c. 40A do not automatically establish aggrievement under G. L. c. 4 0 B) .

map amendment, they lack standing under any potentially applicable formulation.

The plaintiffs' failure to establish any legal harm also is fatal to their due process claims. See *Doe* v. *Governor*, 381 Mass. 702, 704-705 (1980). Likewise, the plaintiffs' claim for breach of trust against Harvard, also fails for lack of standing, albeit for somewhat different reasons. If one assumes that the alleged trust is a public trust, only the Attorney General has standing to allege misuse of charitable assets. See G. L. c. 12, § 8; *Dillaway* v. *Burton*, 256 Mass. 568, 573 (1926); *Weaver* v. *Wood*, 425 Mass. 270, 275 (1997). If one assumes that the trust is a private trust, the plaintiffs do not have standing because they are not named beneficiaries or suing on behalf of a person who is a named beneficiary. See *ibid.* citing *Collector of Taxes of Lowell* v. *Slafsky*, 332 Mass. 700 (1955).

To the extent that we have not specifically addressed other points made by the plaintiffs in their brief, they "have not been overlooked. We find nothing in them that requires discussion." *Department of Rev.* v. *Ryan R.*, 62 Mass. App. Ct. 380, 389 (2004), quoting from *Commonwealth* v. *Domanski*, 332 Mass. 66, 78 (1954).[6]

Judgment affirmed.

---

[6] We have been informed that this is the fourth time that the plaintiffs have brought an action challenging a development in the Mission Hill area, and that, in each case, they were found not to have standing to bring their claims. The plaintiffs are reminded of the potential for sanctions to be imposed upon those who file vexatious lawsuits and appeals. Though we may, in the exercise of our discretion, elect to award fees even where they are not requested in the appellees' brief, see, *e.g.*, *Rubenstein* v. *Royal Ins. Co. of America*, 429 Mass. 355, 361 (1999); *Love* v. *Pratt*, 64 Mass. App. Ct. 454, 458-459 (2005), we decline to do so here.

By the Court (Grasso, Smith & Cohen, JJ.),

/s/ [Illegible]
Clerk

Entered: July13, 2006.

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

SUFFOLK, ss. [Filed June 9, 2003]

CIVIL ACTION 01-3447

KATHRYN J. BROOKINS and OSCAR BROOKINS,
Plaintiff(s),

v.

THE BOSTON ZONING COMMISSION, *et al.*,
Defendant(s).

JUDGMENT ON FINDINGS BY THE COURT

THIS ACTION CAME ON FOR HEARING BEFORE THE COURT, HAGGERTY J., PRESIDING, AND THE ISSUES HAVING BEEN DULY HEARD AND FINDINGS HAVING BEEN DULY RENDERED, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

Summary Judgment shall enter for the Defendants on Counts, I, II, III, and IV,

(Refer to memorandum of decision and order for Defendants' Motion for Summary Judgment.)

Dated At Boston, Massachusetts, This 5th Day of June, 2003.

MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

By: /s/ [Illegible]
ASSISTANT CLERK

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

SUFFOLK, ss

Civil Action No. 01-3447-B

KATHRYN J. BROOKINS AND OSCAR T. BROOKINS,
Plaintiffs,

vs.

THE BOSTON ZONING COMMISSION, *et al.*,[1]
Defendants.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Kathryn J. Brookins and Oscar T. Brookins ("the Brookinses") brought this action against The Boston Zoning Commission ("BZC"), The Boston Redevelopment Authority ("BRA"), President and Fellows of Harvard College ("Harvard"), and the Mission Hill Neighborhood Housing Services ("MHNHS") seeking to appeal the BZC's approval of map amendment No. 390, a development plan for planned development area No. 52, and map amendment 6d, Mission Hill Neighborhood District ("Map Amendment"). The Brookinses allege that BZC, BRA, Harvard, and MHNHS engaged in illegal contract zoning (Count I). In addition, the Brookinses allege that the BZC and Harvard participated in illegal spot zoning (Count II), that Harvard violated the trust placed in them by their Charter and the Constitution of

---

[1] Boston Zoning Commission, Boston Redevelopment Authority, President & Fellows Harvard College, Mission Hill Neighborhood Housing Services, and, defendant/intervenor, One Brigham Circle LLC.

Massachusetts (Count III), and that the BRA, BZC, and Harvard violated the Brookinses' right to meaningful due process guaranteed under the 14th Amendment to the U.S. Constitution (Count IV).[2] One Brigham Circle LLC ("OBC") intervened as a party defendant in the action. All defendants now move for summary judgment arguing that the Brookinses do not have standing to bring the stated claims. For the reasons stated below, I ALLOW the defendants' motions for summary judgement on Count I, II, III, and IV.

BACKGROUND

This action arises out of the sale and proposed development of a parcel of land containing 9.25 acres and situated at Brigham Circle in the Mission Hill Neighborhood of Boston, the "Ledge Site". The Property contains two distinct areas: the 3.75 acre Community Commercial Subdistrict ("CCS") portion including two buildings; and a 5.5 acre Conservation Protection Subdistrict ("CPS"). The developer, OBC, proposes to demolish the existing buildings on the Ledge Site and then develop a four-story, mixed-use development consisting of retail space, office space, parking, a pedestrian plaza, and a 5.5 acre protected open park space.

The Boston Zoning Enabling Act ("Enabling Act"), St. 1956, c. 665, § 1, established the BZC. The Enabling Act, authorizes the BZC to adopt zoning regulations to promote the "health, safety, convenience, morals or welfare" of the inhabitants of the City of Boston. St. 1956, c. 665, § 2. Likewise, it outlines the procedure the BZC must follow in adopting an amendment or change to the City of Boston Zoning

---

[2] In their amended complaint, the Brookinses do not explicitly bring Count II and Count IV against Harvard. However, in their response to Harvard's motion for summary judgement, the Brookinses state that they brought all Counts against Harvard. Harvard has joined in summary judgement on all Counts. Therefore, I include Harvard as a party to all Counts and apply their motion for summary judgement as to all Counts.

Code (the "Code"). St. 1956, c. 665, § 3. Before making any such alteration, the BZC must provide the BRA an opportunity to make a recommendation of the proposed action and provide notice to the public and a hearing. Id. In addition, the Mayor of the City of Boston must approve all zoning changes. *Id.*

On February 23, 2001, OBC submitted a development plan for the Ledge Site to the BRA. On May 8, 2001, after a public hearing, the BRA voted to approve OBC's development plan for the Ledge Site, and authorized its Director to petition the BZC for approval of the Map Amendment.

On June 27, 2001, after a public hearing, the BZC voted to approve the development plan for the Ledge Site, and approved the Map Amendment. On the same day, the Mayor of the City of Boston, Thomas M. Menino, approved the Map Amendment.

When the Brookinses commenced this action in July 2001, Harvard owned the Ledge Site and had executed a Purchase and Sale Agreement, dated April 12, 2000, to sell the property to OBC for a purchase price of $2 million. On or about December 11, 2001, Harvard conveyed a portion of the Ledge Site, totaling approximately 141,125 square feet, to OBC. Thereafter, on or about January 7, 2002, Harvard conveyed the remaining portion of the Ledge Site to Friends of Puddingstone Park, Inc., a Massachusetts charitable corporation whose sole member is OBC.

The Brookinses reside at 4 Hillside Street in Mission Hill. Their property lies at least 1000 feet from the open park space located in the CPS, and further from the CCS. The Brookinses have not alleged any ownership of property which abuts the property subject to the Map Amendment. Nor have the Brookinses alleged ownership of any property that abuts other property which itself abuts the Ledge Site.

SUMMARY JUDGEMENT

The Court grants summary judgment where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *McNeil* v. *Metropolitan Prop. & Liab. Ins. Co.*, 420 Mass. 587, 589 (1995). The burden of proof that rests on the plaintiffs, entitles the defendant to summary judgement if the defendant "demonstrates, by reference to material described in Mass. R. Civ. P. 56 (c), unmet by countervailing materials, that the [plaintiff] has no reasonable expectation of proving an essential element" of their case. *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). The court resolves any conflicts in the affidavits, documents, or facts the parties present, and makes all logically permissible inferences in the nonmoving party's favor. *Coveney* v. *College of the Holy Cross*, 388 Mass. 16, 17 (1983). If a genuine issue of material fact may exist, the court should deny a summary judgement motion. *Correllas* v. *Viveiros*, 410 Mass. 314, 316-317 (1991).

DISCUSSION

I. The Brookinses Lack Standing Under Applicable State Law to Bring a Claim of Spot Zoning and Contract Zoning

A. The Brookinses Lack Standing Under Applicable State Law to Appeal the Action of BZC

Defendants have moved to dismiss the Brookinses' appeal of the Map Amendment on the ground that plaintiffs lack standing. The Enabling Act provides the procedure for appeals from decisions of the BZC. St. 1956, c. 665 § 10A. Section 10 allows anyone aggrieved by the BZC's approval of a Map Amendment to appeal the decision to the Suffolk Superior Court. Although unique in procedural and substantive detail, Section 10 parallels Section 11 of the Enabling Act and the State Enabling Act, G.L. c. 40A. "[I]n consid-

ering the validity of zoning amendments . . . the courts have looked to principles established in cases decided under G.L. c. 40A. *National Amusements, Inc.* v. *Boston*, 29 Mass. App. Ct. 305, 308-309 (1990). *Circle Lounge & Grille, Inc.* v. *Board of Appeals of Boston*, 324 Mass. 427, 432-433 (1949). *Sherill House, Inc.* v. *Board of Appeals of Boston & Other*, 19 Mass. App. Ct. 274, 275 (1985). When determining whether the Brookinses situation entitles them to aggrieved person status, I look at the definition of aggrieved person as explained in cases brought under all three provisions.

Aggrieved person status is a jurisdictional requirement. *Tsogronis* v. *Board of Appeals of Wareham*, 415 Mass. 329, 334 (1993). Abutters and abutters to abutters enjoy a rebuttable presumption of aggrieved person status. *Valcourt* v. *Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 127 (1999), cert. denied, 430 Mass. 1114 (2000). Without this presumption, the plaintiff has the burden to prove standing. *Id.* To qualify as an aggrieved party, "a plaintiff must establish—by direct facts and not by speculative personal opinion—that his injury is special and different from the concerns of the community." *Barvenik* v. *Board of Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992). A plaintiff must show that the government's actions have injured or will likely injure his legal rights or adversely affect his property interest. *Id.* Therefore, an aggrieved party includes 1) an abutter or 2) a person injured in a way different from the community at large who can demonstrate the injury through direct facts, not speculation.

1) The Brookinses are not persons aggrieved as they are not abutters or abutters to abutters of the Ledge Site

The Brookinses reside at 4 Hillside Street in Mission Hill. In this case, the Brookinses property does not abut the Ledge Site and does not abut any abutter to the Ledge Site. The Brookinses residence lies 1/4 mile from the Ledge Site. As

owners of non-abutting property, the Brookinses do not qualify for the presumptive status of aggrieved party. Therefore, the Brookinses must show that government action is likely to infringe on their legal rights or property interest.

2) The Brookinses are not persons aggrieved as they allege only a general civic concern, unsupported by direct facts

In the present matter, the Brookinses, although undoubtedly sincere in their concerns, have demonstrated no more than a general civic interest in their appeal of the Map Amendment. The Brookinses fall far short of demonstrating that level of infringement of their rights that would bestow upon them aggrieved person status.

The Brookinses allege a general civic concern that traffic generated from the project and the corresponding air pollution will adversely affect the Mission Hill Community. The Brookinses do not support this claim with anything but speculation. The Brookinses have neither communicated with a traffic engineer nor commissioned any traffic studies to determine how or whether the increase traffic created by the project will adversely effect them or the Mission Hill Community. The Brookinses state general concerns about the impact of the additional vehicles on the Mission Hill neighborhood, but not themselves specifically, and not in a way contrary to the rest of the community. Therefore, the Brookinses' general civic concern regarding traffic and air pollution does qualify them for aggrieved person status.

The plaintiffs further claim that the project will reduce their property values. Again, the Brookinses do not support this argument with anything but speculation. The Brookinses' reside at least 1/4 mile from the proposed open park space and further form the CCS. An intensely developed urban area lies between the Brookinses' land and the Project Site. Accordingly, they cannot see or hear the project from their

property, nor will the project cast any shadow on their property. The Brookinses did not consult with a real estate appraiser and do not provide any direct facts that would lead the court to the conclusion that the project will specifically reduce their property value. Such blind accusation does not confer aggrieved person status on the Brookinses.

The Brookinses have not established standing to challenge the decision of the BZC. They have not proven that they are an abutter. They have not demonstrated an infringement on a personal right or interest. Furthermore, the Brookinses cannot show that the Ledge Site will adversely affect their legal rights or property interests, as they have provided only speculation in support of claims of general civic concern. Accordingly, the Brookinses are not a party aggrieved and do not have standing to appeal the Map Amendment of the BZC.

B. The Brookinses Lack Stand Under Applicable State Law to Seek Judicial Review of the BRA's Activities

The Brookinses lack standing to maintain a claim against the BRA's decision to recommend the Map Amendment to the BZC. Neither the Code nor the Enabling Act provide for judicial review of either the BRA's approval of the PDA made pursuant to Section 3-1A.a of the Code, or authorization for its Secretary to petition the BZC for approval of the Map Amendment and PDA. See, *St. Botolph Citizens Community. Inc.*, v. *Boston Redevelopment Authority*, 429 Mass. 1 (1999).

Under the Code, the BRA makes recommendations to the Zoning Commission on zoning amendments, and is responsible for reviewing and making recommendations to the Board of Appeal on petitions for conditional use permits, exceptions, variances, and other zoning relief. The Enabling Act does not provide for an appeal process from the recommendation given by the BRA and used by the BZC in rendering its decision whether to adopt the Map Amendment.

Thus, while the ultimate decision reached by the BZC may be reviewable by the court pursuant to section 10A of the Enabling Act, the BRA approval of the PDA Development Plan and recommendation provided to the BZC by the BRA is not. The plaintiffs have not provided any alternative common law or statutory basis to challenge the decision.

Assuming *arguendo* that the plaintiffs have a right to seek judicial review of the BRA's actions under Article 3-1A.a,[3] for the reasons set forth above, the Brookinses lack standing.

C. Even if the Brookinses Had Standing, Their Claim of Contract Zoning Fails

Even if the Brookinses had standing, their claim of contract zoning fails. Contract zoning involves a process by which "a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property." *Rando* v. *Town of North Attleborough*, 44 Mass. App. Ct. 603, 607 (1998) (citations omitted). The case of *Sylvania Electric Products. Inc.* v. *Newton*, implicitly permits contract zoning so long as the action does not contradict the best interests of the city or town or offend to general public policy and so long as the restrictions or conditions relate to the rezoned land, the locus. *Sylvania Electric Products, Inc.* v. *Newton*, 344 Mass. 428, 434 (1962). Current views of contract zoning would result in an invalid rezoning only where there is an express bilateral agreement that bargains away the municipality's future use of the police power. *Rando* v. *Town of North Attleborough*, 44 Mass. App. Ct. at 607 (citations omitted).

[3] The plaintiffs could also ask for certiorari "to correct substantial errors (but not administrative, political, political, or legislative decisions)." *St. Botolph* v. *Citizens Committee, Inc.* v. *Boston Redevelopment Authority*, 429 Mass. at 7. However, this is not applicable here.

Contract zoning only occurs between the developer and the municipality, here OBC and BZC. Harvard, was not the developer, but owner of the property and therefore not a valid party to a claim of contract zoning. OBC, as developer and party to the purchase and sale agreement with Harvard is the valid party. However, the Brookinses have provided no evidence that OBC was involved in an exchange of development rights with BZC. OBC is the proper petitioner with respect to the Ledge Site. Even if the purchase and sale agreement was conditioned upon approval of the Map Amendment, OBC was still the correct party petitioner. *Carson* v. *Board of Appeals of Lexington*, 321 Mass. 649, 651 (1947).

For the foregoing reasons, the defendants' motion for summary judgement on Count I is ALLOWED.

D. Even if the Brookinses Had Standing, Their Claims of Spot Zoning Fail

Courts have defined spot zoning as the "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot." *Lamarre* v. *Commissioner of Pub. Works of Fall River*, 324 Mass. 542, 545 (1949). In order to succeed with a challenge based upon spot zoning, the plaintiffs must demonstrate that the BZC adopted the Map Amendment without a well-considered plan for public welfare and solely for the economic benefit of the owner of the land affected by the Amendment. *Sullivan* v. *Acton*, 38 Mass. App. Ct. 113, 115 (1995). The challenger bears the burden of overcoming the presumption of validity that the amendment enjoys by showing beyond a reasonable doubt that the amendment conflicts with the enabling legislation. *Beal* v. *Building Comm'r of Springfield*, 353 Mass. 640, 642-643 (1968) (ci[illegible] omitted); *Caires* v. *Building Comm'r. of Hingham*, 32[illegible] Mass. 589, 594-595 (1949).

The project will provide the Mission Hill Community with numerous and substantial benefits. In addition to the benefits of the project itself, the partnership has committed to provide a series of improvements to the Mission Hill Neighborhood, including 5.5 acre's of public open space, a pedestrian plaza, night and weekend parking, and a pedestrian connection between Brigham Circle and the Mission Hill Neighborhood.

The Brookinses offered no reasoned or particularized argument to the contrary. *Kimberk* v. *Boston Zoning Commission & Another*, 53 Mass. App. Ct. 1109 (2001). The characteristics of the project, and its public benefits, are not in dispute. The Brookinses have not demonstrated that the approval of Map Amendment was arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare, and has shown no reasonable likelihood that it would be able so to demonstrate at trial. The Map Amendment was within the BZC's authority under PDA.

The Brookinses have made no showing that they will be able to sustain its claim of illegal spot zoning at trial. The partnership, on the other hand, supported by the BRA report, made a substantial showing that the project, including the map amendment, is substantially related to, and promotes, the public welfare. Therefore, the defendants' motion for summary judgement on Count II is ALLOWED.

II. The Brookinses Lack Standing to Bring a Breach of Trust Claim

Assuming *arguendo* that Harvard is a public trust, the Brookinses do not have standing to bring a breach of trust claim. When a trust is charitable, and devoted to purposes that are beneficial to a broader community, "[t]he attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." G.L. c. 12, § 8. In *Dillaway* v. *Burton* the court held that it is "the

exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings." *Dillaway* v. *Burton*, 256 Mass. 568, 573, (1926). It is his duty to protect the public interests and to proceed in the prosecution as those interests may require. *Id.*

The Court has, on occasion, recognized a private plaintiffs standing to make claims against a public charity, but only where the plaintiff asserts "interests in such organizations which are distinct from those of the general public." *Lopez* v. *Medford Community Ctr., Inc.*, 384 Mass. 163, 167 (1981). In each such case the claim has arisen from a personal right that directly affects the individual member, such as where the member has a right to exercise a vote in connection with some aspect of the charity's affairs (a right not present here) and the charity prohibits the member from doing so. See *Id.*

Since the Brookinses are not and do not claim to he the Attorney General, they do not have standing to bring a claim against Harvard for breach of public trust. Furthermore, they have not asserted an interest distinct from the general pubic. Therefore, the Brookinses have no standing as a private plaintiff to bring a claim against Harvard for breach of public trust.

In the case of a private trust, only a named beneficiary, or one suing on his or her behalf, can maintain an action to enforce a trust. *Collector of Taxes of Lowell* v. *Slafsky*, 332 Mass. 700 (1955). The Brookinses admit that they are not named beneficiaries of the "trust" they allege Harvard breached, and concede that they do not claim on behalf of a named beneficiary. These facts compel the conclusion that, if Harvard were considered a private trust, the Brookinses lack standing to prosecute breach of private trust.

For the foregoing reasons, the Brookinses claim for breach of trust against Harvard fails. Summary judgment for Harvard on Count III is ALLOWED.

III. The Brookinses Lack Standing to Bring Constitutional Claims

In Count IV of the amended complaint, the Brookinses allege that the public agencies violated their right to meaningful due process guaranteed by the 14th Amendment to the United States. According to the plaintiffs, the public agencies violated their 14th Amendment rights when the BRA voted to approve the PDA with only insufficient information before it, and when the BRA and the BZC approved the PDA without first providing the plaintiffs with complete information about the zoning amendments.

* * * *

and the BZC approved the PDA without first providing the plaintiffs with complete information about the zoning amendments.

"From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government." *Kaplan* v. *Bowker*, 333 Mass. 455, 459 (1956); *Doe* v. *The Governor*, 381 Mass. 702 (1980).

The Brookinses allege a procedural due process argument. However, the BRA and BZC have acted within the procedures laid out in the Code, Section 80C-1, PDA Review. The Brookinses have had opportunity to participate in the review process, attend meetings, and review documents. After public comment periods, at an open meeting, the BRA voted to recommend the Map Amendment to BZC which subsequently approved the Map Amendment.

The BRA and BZC have not violated the Brookinses due process rights where they afforded them opportunity for participation, but chose not to vote according to the Brook-

inses' views. They have failed to show that they were denied due process or that they have suffered from a legal harm.

Accordingly the defendants' motion for summary judgement on Count IV is ALLOWED.

ORDER

For the foregoing reasons, it is hereby ORDERED that the defendants are entitled to summary judgement on Counts I, II, III and IV.

/s/ S. Jane Haggerty
S. JANE HAGGERTY
Justice of the Superior Court

Dated: May 5, 2003

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

SUFFOLK, ss. [Filed Feb. 28, 2002]

Civil Action No. 01-3447-B

KATHRYN J. BROOKINS and OSCAR T. BROOKINS,

vs.

THE BOSTON ZONING COMMISSION, *et al.*,[1]

MEMORANDUM OF DECISION ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Kathryn and Oscar Brookins, *pro se*, challenge a decision of the Boston Zoning Commission ("BZC") authorizing a large-scale redevelopment project known as One Brigham Circle in the Mission Hill area of Boston. Other defendants named in the suit include the Boston Redevelopment Authority ("BRA") which oversaw the planning and design of the project, the Mission Hill Neighborhood Housing Services, a community-based association that provided input into the project, One Brigham Circle, LLC, the developer, and Harvard University which sold or donated parcels of land upon which the project is to be located. Brought in four counts, the Brookins charge that the defendants engaged in contract zoning (Count One), spot zoning (Count Two), and violated due process (Count Four). In Count Three the

[1] The Boston Redevelopment Authority, President and Fellows of Harvard College, Mission Hill Neighborhood Housing Service, and One Brigham Circle, LLC.

Brookins allege that Harvard violated their charter in conveying land for a non-educational purpose.

The Brookins filed their complaint in July, 2001, within thirty days of the BZC's decision. On February 5, 2002, they learned that the developers were scheduled to begin blasting activities at the site, which consists of approximately six acres of land (some level and some sloped under rock ledge). The Brookins, *ex parte*, sought a restraining order to halt site work. After a hearing, the Court denied the request for a temporary restraining order and scheduled a hearing on a motion for preliminary injunction for February 12, 2002.

DISCUSSION

The standards for a preliminary injunction are well known and established. See *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001)("To succeed in an action for preliminary injunction the plaintiff must show: 1) a likelihood of success on the merits; 2) that irreparable harm will result from denial of the injunction; and 3) that, . . . the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant . . ."); see also *Packaging Industry Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Additionally, a request to enjoin a government action requires that the court consider whether the relief sought will adversely affect the public interest. *Tri-Nel Management, supra*, at 219.

To establish they have a reasonable likelihood of success on the merits of their action, the Brookins must demonstrate some right or interest, recognized in the law, to bring suit. In tie context of zoning cases, a plaintiff must prove that he or she is an "aggrieved person" in order to gain standing to challenge the governmental decision. *Watros v. Greater Lynn Mental Health and Retardation Association, Inc.*, 421 Mass. 106, 107 (1995); *Cohen v. Zoning Board of Appeals of Plymouth*, 35 Mass.App.Ct. 619, 620 (1993), rev. den. 417

Mass. 1102 (1994); Boston Zoning Enabling Act, St. 1956, § 10A. Proof of aggrieved status requires more than a generalized concern about the impact of a decision on the community at large, and cannot be based on speculation or conclusory allegations. Rather, the party seeking standing must demonstrate an adverse impact on a personal legal right or property interest that is different in degree from the public-at-large. See *Bell v. Board of Appeals of Gloucester*, 429 Mass. 551, 554 (1999); *Bevarnik v. Bd. of Alderman of Newton*, 33 Mass. App. Ct. 129, 132 (1992).

In the instant case, the Brookins fail entirely to assert any personal or property interest that confers standing to bring this action. Although they reside in the Mission Hill neighborhood, their residence is located some distance from the project site and separated by other streets and many structures (both homes and storefronts). The Brookins' interest in this litigation seems related to their status as longstanding community activists more than it does to a personal claim of adverse impact. Oscar was a member of the Mission Hill Neighborhood Housing Service in the 1980s and both plaintiffs have been involved in publishing a community newspaper for many years.

Additionally, the Brookins' underlying assertions of adverse impact do not appear any different from concerns shared by the community at large. As set forth in the plaintiffs' deposition testimony (submitted as exhibits to the Defendant BZC's Opposition to Motion for Preliminary Injunction), the Brookins contend that the already congested traffic patterns on Huntington Avenue and Tremont Street will be worsened by the project. Also, as a consequence of more vehicles, there will be greater air pollution. The Brookins fail to show that these conditions, even if proven, would impact them more substantially than other residents of Mission Hill. Consequently, in the absence of a showing of particularized impact that is adverse to their legal or property interests, this

Court cannot conclude that the Brookins have a likelihood of success on the merits of their motion for preliminary injunction, that there is a genuine public interest in continuing development at this time. The City of Boston, through the BRA, has worked extensively with community and business interests to craft a multi-use plan for the parcel in question, and further delay will not benefit the neighborhood or the community as a whole. On balance, therefore, the Brookins' request for injunctive relief must be, and is hereby DENIED.

/s/ Jeffrey A. Locke
Jeffrey A. Locke
Justice of the Superior Court

Dated: February 12, 2002

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

SUFFOLK SS

CIVIL ACTION NO. 01-3447-B

KATHRYN J. BROOKINS AND OSCAR T. BROOKINS,
Plaintiffs,

v.

THE BOSTON ZONING COMMISSION, THE BOSTON REDEVELOPMENT AUTHORITY PRESIDENT AND FELLOWS OF HARVARD COLLEGE, THE MISSION HILL NEIGHBORHOOD HOUSING SERVICES AND ONE BRIGHAM CIRCLE, LLC
Defendants.

REQUEST FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs request this Court issue a Temporary Restraining Order [Mass. Rules of Court 65 (a)] to the Defendant, One Brigham Circle, LLC and its contractors to suspend all their construction, demolition and all other site preparation activities on the subject site at 1620 Tremont (One Brigham Circle) until such time as the Court reviews the Plaintiffs' request for a permanent injunction pending a resolution of the matters before the Court. We pray that the Court will issue this TRO so that the matters we have brought before the Court in our Complaint may be resolved by the Court and not by dynamite.

We filed our Complaint challenging a decision of the Zoning Commission granting zoning changes for the site at One Brigham Circle. Under Chapter 665 of the Acts of 1956, the

Boston Zoning Code we are entitled to such relief in Article 10 A.

Without a TRO being issued the Defendant One Brigham Circle will begin blasting at the 3 subject site this week which will render the site irreparably changed. The contractors, Dimeo Construction Co., have announced their intentions to remove 13,000 cubic yards of ledge rock, a form, of granite from the lower portion of the site and relocate it on what is to be a park on the upper portion of the site.

Plaintiffs pray that the Court will honor this request.

Respectfully submitted,

/s/ Kathryn J. Brookins
Kathryn J. Brookins, pro se

/s/ Oscar T. Brookins
Oscar T. Brookins, pro se
4 Hillside Street, Roxbury, MA 02120
(617) 427-4140
Dated February 6, 2002

Judge's comments:

After hearing an ex parte request for TRP. And review of Affidavits and exhibits, request is denied as TRO but short order of notice to issue for hearing as injunctive relief.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

CIVIL ACTION NO. 01-3447-B

KATHRYN J. BROOKINS AND OSCAR T. BROOKINS,
Plaintiffs,

v.

THE BOSTON ZONING COMMISSION, THE BOSTON REDEVELOPMENT AUTHORITY, PRESIDENT AND FELLOWS OF HARVARD COLLEGE, AND THE MISSION HILL NEIGHBORHOOD HOUSING SERVICES,
Defendants.

EMERGENCY MOTION TO INTERVENE OF ONE BRIGHAM CIRCLE, LLC

Pursuant to Superior Court Rule 9A(e) and Mass. R. Civ. P. 24, One Brigham Circle, LLC ("OBC") hereby requests that the Court allow it to intervene as a party defendant in this action.

As grounds for this motion, OBC states as follows:

1. In this action, plaintiffs seek , among other things, a declaration from this Court that would annul an action of the Zoning Commission of the City of Boston (the "BZC") which approved the development plan for Planned Development Area No. 52 (the "PDA") and which amended map "6d, Mission Hill Neighborhood District" (the "Amendment") of the series of maps entitled Zoning Districts City of Boston," dated August 15, 1962.

Judges Comments:

Emergency Motion to Intervene of One Brigham Circle, LLB;. September 17, 2001

"10/09/01. [After hearing, I reconsidered the mater and affirmed my earlier decision (10/17/01) Allowing the Motion to Intervene.]

/s/ [Illegible]

APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

SUFFOLK, ss

CIVIL ACTION NUMBER: 99-0249G

OSCAR T. BROOKINS AND KATHRYN BROOKINS
Plaintiffs,

v.

BOARD OF APPEAL,
Defendants.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND MEMORANDUM IN SUPPORT THEREOF

Now comes the defendant in the above-entitled matter and respectfully requests that this Honorable Court dismiss the plaintiffs' complaint. As reasons therefore, defendant states that the plaintiffs are not "person aggrieved" and therefore lack standing to file this complaint.

A. Statement of the case.

The plaintiffs have appealed, pursuant to the City of Boston Zoning Enabling Act, St. 1956, c. 665, § 11, the decision of the City of Boston Board of Appeal granting variances and conditional use permits for the use of property at 714-716 Parker Street" (Complaint, Par 6).

According to § 11, however, only a "person aggrieved by a decision" may challenge a decision of the Board of Appeals. The plaintiffs have presented no creditable: evidence that they

are "person(s) aggrieved" and therefore lack standing to bring this challenge. Because the plaintiffs have presented no credible evidence to support his contention that he is "person(s) aggrieved" and consequently lacks standing to challenge the decision of the Board of Appeal and the defendant is entitled to have this action dismissed.

B. The plaintiffs are not persons aggrieved.

1. Only "person(s) aggrieved" have standing to challenge a decision of the Board of Appeal.

Only a "person aggrieved" has standing to challenge a decision of the City of Boston Board of Appeal. St. 1956, c. 665, § 11, as amended. *See also Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719, 721 (1996); *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.*, 421 Mass. 106, 107 (1995); *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129, 130-133 (1992). A plaintiff is a "person aggrieved if he suffers some infringement of his legal rights." *Marashlian*, 421 Mass. at 721; *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 430 (1949). *See also, Cohen v. Zoning Board of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 624 (1993) (an interest in "preserving the integrity of [their] zoning district" is insufficient to grant plaintiffs' standing.), *Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989) (Plaintiffs must show a "plausible claim of a definite violation of a private right, property interests, or legal interest"); The injury to the plaintiff's legal rights must be more than speculative. *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 335 (1993) (Abrams, J. dissenting); *Boston Edison Co. v. Boston Redevelopment Authority*, 374 Mass. 37, 46 ("(I)n many, if not most, circumstances, the injury complained of may be too remote to make the party seeking review [of a zoning board of appeal decision] a "person aggrieved.").

Abutters generally enjoy a presumption of standing as "persons aggrieved". *See Watros*, 421 Mass. at 111; *Bedford v. Trustees of Boston University*, 25 Mass. App. Ct. 372, 376 (1988); *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). However, the presumption is rebuttable. *Watros*, 421 Mass. at 111; *Barvenik*, 33 Mass. App. Ct. at 131. The presumption of standing for an abutter recedes when a defendant challenges the plaintiff's status as an aggrieved person. *Watros*, 421 Mass. at 111; *Barvenik*, 33 Mass. App. Ct. at 131 and n. 7. If standing is challenged, the jurisdictional question is decided on "all the evidence with no benefit to the plaintiffs from the presumption." *Barvenik*, 33 Mass. App. Ct. at 131. A review of standing based on all the evidence does not require that the fact finder ultimately find the plaintiffs allegations meritorious, but rather, "the plaintiff must put forth credible evidence to substantiate his allegations." *Marashlian*, 421 Mass. at 721.

Plaintiffs must establish "by direct fact and not by speculative personal opinion that [his] injury is special and different from the concerns of the rest of the community." *Barvenik*, 33 Mass. App. Ct. at 132. The plaintiffs must put forth creditable evidence to substantiate claims of injury to their legal rights which is neither speculative nor too remote to make the plaintiffs persons aggrieved. *Marashlian*, 421 Mass. at 723. *See also Barvenik*, 33 Mass. App. Ct. at 132. ("Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood insufficient bases for aggrievement under Massachusetts law."); feeling, or the loss of open or natural space are all considered *Boston Edison Company v. Boston Redevelopment Company*, 374 Mass. 37, 46 (1977). One factor to be considered is the "magnitude of the threat of harm from a use permissible as of right." *Marashlian*, 421 Mass. at 724.

2. The Plaintiffs Lack Standing.

The plaintiffs in this action have not met the standards necessary to be considered a "person aggrieved" and therefore lack the standing to challenge the decision of the Board of Appeal. The plaintiffs, in their complaint, simply state that they own property within 120 feet of the properties at 714-716 Parker Street." (Par 5). The plaintiffs have not put forth "creditable evidence to substantiate [his] allegations," as required by *Marashlian*, 421 Mass at 721, nor have they established "by direct fact and not by speculative personal opinion —that [his] injury is special and different from the concerns of the rest of the community." *Barvenik*, 33 Mass. App. Ct. at 132.

CONCLUSION

Because the plaintiffs have presented no creditable evidence to support their contention that they are "person(s) aggrieved" and consequently lack standing to challenge the decision of the Board of Appeal, the matter must be dismissed.

Wherefore, the defendant respectfully requests that this Court grant its Motion to Dismiss and enter judgment in its favor.

RESPECTFULLY SUBMITTED,
Defendant Board of Appeal

/s/ Karen M. Coppa
KAREN M. COPPA BBO 544880
Assistant Corporation Counsel
City of Boston Law Department
City Hall, Room 615
Boston, MA 02210
(617) 635-4046

Judges Comments:

Defendant's Motion to Dismiss Plaintiffs' Complaint and Memorandum in Support Thereof. Allowed October 14, 1999. ALLOWED:

10/44/99 "The defendant and the intervenor have demonstrated without doubt that the plaintiffs' have no standing. The plaintiffs' property is many yards from the locus, down the street and a considerable distance, and their across the street at a large Y intersection. Plaintiffs are not abutters or abutters of abutter. The plaintiffs have failed to allege any facts that demonstrate any facts that will directly affect them, or that it exceeds any kind of general and unspecified injury to any other property owners in the area. Accordingly the within motion is Allowed" signed.

/s/ [Illegible] Voltera, Justice

APPENDIX K

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT CIVIL ACTION

Suffolk, ss.

NO. 93-3632

KATHRYN J. BROOKINS AND OSCAR T. BROOKINS,

vs.

CITY OF BOSTON ZONING COMMISION, BOSTON REDEVELOPMENT AUTHORITY, COMMONWEALTH OF MASSACHUSETTS, BETH ISREAL HOSPITAL, AND PRESIDENT AND FELLOWS OF HARVARD COLLEGE.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Kathryn and Oscar Brookins ("Brookins") have brought the present action pro se, challenging the rezoning of the Mission Hill and Fenway area in Boston, the creation of the Beth Israel Hospital Institutional District ("BIHID"), and the Commonwealth's transfer of property to Beth Israel Hospital. Named as defendants in the suit are the City of Boston Zoning Commission ("BZC") and the BZC's individual members, the Boston Redevelopment Authority ("BRA") and the BRA's individual members, the Commonwealth of Massachusetts Division of Capital Planning ("DCP"), Bath Israel Hospital ("Beth Israel"), and the President and Fellows of Harvard College ("Harvard").

The various defendants have moved to dismiss all claims on the grounds that plaintiffs have no standing to challenge the actions complained of, that certain of plaintiffs' zoning challenges are untimely, and that plaintiffs have failed to state

a claim.[1] For the reasons set forth below, defendants' motions to dismiss are allowed and the action is hereby dismissed.

Facts

Plaintiffs reside in and own property located at 4 Hillside Street, Boston. Their home is located in the Mission Hill Zoning District.

On November 2, 1992, the BZC created the BIHID by way of various text and map amendments. These zoning amendments creating the BIHID became effective on November 11, 1992 upon the Mayor's signature.

On December 18, 1992, the DCP transferred to Beth Israel a parcel of property located at 364 Brookline Avenue, a site previously used by the Massachusetts College of Art. Pursuant to the legislature's directive, the proceeds from the sale of the property were placed in the Mission Hill/Fenway Neighborhood Trust. St. 1988, c. 208, § 34.

On April 27, 1993, the BZC created the Mission Hill Interim Planning Overlay District (Mission Hill IPOD). The designation as an "IPOD" is a precursor to rezoning of the area, with the purpose of preventing developers from rushing projects through the permit process just prior to some-change in the zoning law. As an IPOD, proposed development in the area must obtain approval from the Board of Appeal. The creation of the Mission Hill IPOD also referenced the Mission Kill Planning and Zoning Advisory Committee ("PZAC), a citizen advisory group that advises city agencies on land use and development issues. The BRA nominates residents to serve on the PZAC, and the Mayor appoints the actual members of the PZAC.

On June 10, 1393, the BZC granted a "U*" designation for property abutting the Master Plan Zoning District for Beth

[1] Defendant Harvard did not file its own motion, but joined in the other defendants' motions at the time of hearing.

Israel. Plaintiffs allege that this redesignation will vastly increase tie value of a parcel of land (the site of the former Boston English High School) that the BRA intends to sell to Harvard. Plaintiffs' complaint also references the BRA's taking of the Boston English High site, but the complaint does not specify when the BRA taking took place.

Plaintiffs filed the present action on June 16, 1993.

Discussion

I. BIHID

Defendants Seth Israel and the BZC have moved to dismiss plaintiffs' complaint as to the establishment of the BIHID on the ground that the complaint is untimely.

Section 10A of .the Boston Enabling Act (St. 1956, c. 665; St. 1987, c. 371) requires that a plaintiff challenging a zoning map amendment or a zoning, regulation amendment must file an appeal within thirty days at the effective date of the zoning decision.[2] The amendments creating the BIHID became effective on November 11, 1992. The present suit was not filed until June 16, 1993, a date far beyond the expiration of the thirty day statute of limitation.

Massachusetts courts have strictly construed zoning statutes of limitations. "Timely commencement of the appeal in the Superior Court is a condition of maintaining it, 'a condition sine qua non,' and is a requirement this court has 'policed in the strongest way.'" *Cappuccio* v. *Zoning Board*

---

[2] Section 10A reads in pertinent part: "Any persons aggrieved by a decision of the zoning mission approving a zoning map amendment or a zoning regulation or amendment thereof, or by any procedural defect therein, or any municipal board or officer, may appeal such decision to the superior court in the county of Suffolk or the land court; provided, however, that such appeal is filed in said court within thirty days after such decision became affective in accordance with the provisions of section three."

of Appeals of Spencer, 398 Mass. 304, 312 (1986) *quoting Pierce v. Board of Appeals of Carver*, 359 Mass. 804, 808, 811 (1976).

Plaintiffs contend that the zoning changes complained of comprise a continuing series of actions which continued through (and beyond) the June 1993 "U*" designation for the Boston English High property. Because the numerous actions are allegedly linked, the plaintiffs argue that the statute of limitations does not start to run until the effective date of the last action challenged. Under plaintiffs' reasoning, the statute of limitations to challenge a November 1992 zoning amendment would not expire until thirty days after the effective data of whatever subsequent allegedly related zoning action the BZC may take. Such an approach would amount to the permanent suspension of the statute of limitations in matters affecting zoning. Under plaintiffs' argument, the statute of limitations could never act as an effective bar to the filing of an action as long as the work of a zoning commission were ongoing. The court declines to interpret a strict and very short zoning statute of limitations in the manner suggested by plaintiffs.

Accordingly, the statute of limitations bars plaintiffs' complaint with respect to the creation of the BIHID.

II. Mission Hill IPOD and "U*" Designation for Boston English Site

Defendants have moved to dismiss the remainder of plaintiffs' zoning challenges on the ground that plaintiffs lack standing. In order to challenge any zoning amendment in Boston, plaintiff must be a "person aggrieved" by that decision. Enabling Act, § 10A. Standing may not be based on a "general civic interest in the enforcement of the zoning ordinance." *Waltham Motor Inn, Inc.* v. *LaCava*, 3 Mass. App. Ct. 210, 218 (1975). For purposes of standing in zoning challenges, "a person must establish—by direct facts and not by speculative personal opinion—that his injury is special and

different from the concerns of the rest of the community." *Barvenik v. Board of Alderman of Newton*, 33 Mass. App. Ct. 129, 132 (1992). "Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law." *Id.*, at 132-133. See also *Harvard Square Defense Fund. Inc. v. Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989) (plaintiff must demonstrate "a plausible claim of a definite violation of a private right, property interest, or legal interest").

Plaintiffs have not articulated how the interim zoning of the Mission Hill IPOD has caused them to suffer any concrete harm whatsoever. Their complaint objects to interim zoning, with its input from the PZAC, on principle. While plaintiffs' philosophic objection to interim zoning and the use of the PZAC is deeply felt, it amounts solely to an abstract disagreement in principle, not to the kind of direct harm to a legal right that is necessary to confer standing. In an attempt to assert something resembling a direct harm flowing from the adoption of interim zoning, plaintiffs contend that they had architectural plans drawn up to renovate two barns on their property, renovations which would convert the barns to housing units. These plans were allegedly drawn up back in 1990, several years before the zoning amendments now complained of. To date, plaintiffs have still not sought any form of building permit for those allegedly planned renovations, no application having been filed under either the prior zoning ordinances or under the amended zoning laws.[3] There is simply no showing that plaintiffs have any present plan to undertake the barn renovations in the near future.

---

[3] At oral argument, plaintiffs asserted that their failure to follow through with any permit application stemmed from the emotional distress following the disappearance and/or theft of their family dog.

Even if plaintiffs had such a plan, or were to resurrect such a plan, there is nothing in the establishment of the Mission Hill IPOD that prevents them from obtaining a permit. All that the interim zoning does is to require approval for all development projects while the area is being rezoned. It is not a freeze or a moratorium. Since the principal concern in the period prior to rezoning is that major developers will attempt to rush projects through the permit process before the zoning change is implemented, the interim planning overlay is designed as a temporary suspension of any pre-existing automatic right to a permit.[4] The establishment of the Mission Hill IPOD doss not mean, and does not even make it the least bit likely, that an application to renovate two barns into residential housing will be turned down.

Obviously, if plaintiffs do seek such approval and are turned down, they will have their usual rights to have such a permit denial reviewed for error.[5] At present, however, they have no actual application or other concrete plan, let alone one that has been adversely affected by the adoption of a plan of interim zoning. As such, the plaintiffs claims with respect

---

[4] The use of interim zoning pending rezoning of an area is permissible. "Interim zoning can be considered a salutary device in the process of plotting a comprehensive zoning plan to be employed to prevent disruption of the ultimate plan itself. . . . The orderly process of interim zoning allows the issues to have the benefit of full public debate, at the same time protecting the affected area from unwise exploitation prior to agreement and formulation of new zoning restrictions which may be more restrictive." *Collura v. Town of Arlington*, 357 Mass. 381, 883-87 (1975) (upholding town's interim zoning that placed a two-year moratorium on the construction of apartment buildings).

[5] Plaintiffs voice a fear that, in retaliation for their activism in various community matters, the PZAC will refuse to recommend approval for any permit they seek and that, absent PZAC approval, they will not be granted the necessary permit. If an when plaintiffs seek a permit, and if and when the permit is denied, plaintiffs' claims that the permit has been refused for some improper, retaliatory reason can then be examined.

to their potential future plans for their barns do not suffice to establish standing to challenge the establishment of the Mission Hill IPOD.

Plaintiffs' also lack standing to complain of the change in the zoning designation for the former Boston English High site. The complaint does not even attempt to identify how that change in designation (or the BRA's taking of the site) has had any affect on their legal rights. Plaintiffs allege (as they do with respect to the BIHID) general concerns about increased traffic, air pollution, etc. from the development of these sites by medical institutions. These sites and areas are far removed from the plaintiffs' residence. Furthermore, these sorts of concerns, typical of the general concerns of all city dwellers, do not suffice to confer standing in zoning cases. *See Waltham Motor Inn, supra; Barvenik, supra.*[6]

III. Sale of Massachusetts College of Art Site .

Plaintiffs' final complaint pertains to the transfer of the Massachusetts College of Art site to Beth Israel. Plaintiffs contend that the disposition of this piece of public property was not made for any valid public purpose and that placing the sale proceeds in a trust fund is unconstitutional.

In order to challenge the DCP's conveyance of the property, plaintiffs must establish their standing:

> From an early day it has bean an established principle in this Commonwealth that only persons who have themselves suffered or who are in danger of suffering, legal

---

[6] Had plaintiffs' complaint been timely filed with respect to the establishment of the BIHID, plaintiffs would also lack standing to challenge that zoning amendment. Inasmuch as plaintiffs do not live in or even abut the BIHID, they would lack standing to challenge the establishment of the BIHID. Plaintiffs' residence is not at only at a considerable distance from the BIHID, but several medical institutions, numerous commercial establishments, and the META Green Line are all situated in between plaintiffs' residence and the BIND.

> harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of [another] branch of the government.

Pratt v. Boston, 396 Mass. 37, 42 (1985). Plaintiffs have not set forth any legal harm they have suffered as a result of the conveyance of the site. They admit they were not bidders for the real estate. They do mot live anywhere near the parcel in question.

Rather, as amplified at oral argument, plaintiffs simply do not approve of the way the Mission Hill/Fenway Neighborhood Trust will spend the sale proceeds in their neighborhood.[7] Such a concern, however keenly felt, is not the sort of harm to a legal right or legal interest of the plaintiffs that is necessary for purposes of standing.[8]

---

[7] The legislature has designated that the proceeds of the sale are to go to the Mission Hill/Fenway Neighborhood Trust. The Trust is to "give grants or loans to community based Mission Hill and Fenway nonprofit organization [sic], community development corporation [sic] and groups which enhance the quality of life through affordable housing, youth program [sic], elderly programs, social services and whatever the Mission Hill/Fenway Neighborhood Trust deems appropriate." St. 1988, c. 208, § 34.

[8] Inasmuch as plaintiffs lack standing, there is no need to reach defendants' alternative grounds for dismissal of plaintiffs' challenge to the sale of the site. The court notes, however, that the transfer of the property for purposes of economic development (as set forth in the legislation authorizing the disposition of the property (*see* St. 1988, c. 208, § 34)) appears to constitute a valid public purpose. *Opinion of the Justices*, 363 Mass. 880, 885 (1975). Plaintiffs' contention that the transfer will not, in their opinion, ultimately generate sufficient economic development to make the transfer worthwhile does not change the fact that economic development is a valid public purpose. Nor does there appear to be any merit to plaintiffs' contention that the sale proceeds must be deposited into the treasury. Where, as here, the legislature has prescribed that the funds are to go into a designated trust for designated purposes, there is no constitutional infirmity in not depositing the funds into the treasury. *See Opinion of the Justices*, 375 Mass. 851, 854 (1973); *Horton* v. *Attorney General*, 269 Mass. 508, 512 (1929).

ORDER

For the foregoing reasons, the defendants' motions to dismiss are *GRANTED* and it is hereby *ORDERED* that the above action be dismissed in its entirety.

/s/ Matha B. Sosman
MARTHA B. SOSMAN
Justice of the Superior Court

Dated: November 22, 1993

APPENDIX L

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

SUFFOLK, ss.

CIVIL ACTION NO. 90-4779D

KATHRYN J. BROOKINS,
Plaintiff,

vs.

CITY OF BOSTON, BOARD OF APPEAL, *et al.*,
Defendants.

ORDER ON DEFENDANT'S MOTION
FOR STATUTORY BOND

This action is a challenge to the granting of conditional use permits by the Board of Appeal of the City of Boston ("Board") to the defendant President and Fellows of Harvard College. ("Harvard") for the construction of the East Quadrangle Research Facility ("EQRF"). The EQRF will be a six-story research laboratory with an accessory animal facility and underground parking on the campus of the Harvard Medical School. Now before the Court is Harvard's motion for a statutory bond in the amount of $1,188,000.00. After a hearing in which the plaintiff appeared, pro se, and after consideration of the arguments and submissions of the parties, the court finds and rules as follows:

1. The plaintiff, Kathryn J. Brookins ("Brookins"), has no likelihood of success on the merits. First, it is unlikely that Brookins will be able to establish that she is a "person

aggrieved" Within the meaning of the Boston Zoning Enabling Act, St. 1956, c. 665 §11. The evidence indicates that she resides in a different Zoning district several city blocks from the EQRF. Moreover, Brookins has not alleged any private right, property interest or legal interest that the EQRF will violate. Her complaint sets forth a litany of grievances concerning parking, air pollution and traffic congestion. Should Brookins proceed to trial she will be required to show that the decision of the Board is "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). A review of her pleadings indicates that Brookins has not even attacked the decision on these bases. In any event, the Board's decision on its face is legally supported by its detailed findings of fact.

2. Harvard has demonstrated that any substantial delay in the EQRF project would cost millions of dollars and would jeopardize its ability to obtain research grants and to recruit faculty and scientists to work there. The cost of a six-month delay or suspension of construction alone would total $1,188,000.00.

3. While Brookins argued at the hearing that she had no resources to post a bond in any amount, her affidavit and financial statement show that she owns several parcels of improved real estate with equity of at least $180,000.00. Although the plaintiff may not be a wealthy person, she is not exempt from the bond requirement.

4. Having considered the parties' relative likelihood of success on the merits, the potential harm to the recipient of the zoning relief as well as the plaintiff's financial ability to post a bond; and further, bearing in mind that the bond requirement is designed "to discourage frivolous and vexa-

tious appeals"[1], the court rules that Brookins shall post a bond in the amount of $250,000.00.

ORDER

It is hereby *ORDERED* that plaintiff Kathryn J. Brookins shall post a bond, with sureties, in the amount of $250,000.00 with the clerk of this court within fifteen days of the date of this Order.

/s/ Barbara A. Dortch
Barbara A. Dortch
Justice of the Superior Court

DATED: January 14, 1991

[1] *Jack v. Board of Appeal of Boston*, 15 Mass. App. Ct. 311, 313 (1983), *quoting McNeely v. Board of Appeal of Boston*, 358 Mass. 95, 110 (1970).